92-600

No. ———

Supreme Court, U.S.
FILED
OCT 7 1992
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

ADOPTIVE PARENTS OF M.N.M.,
Petitioners,

v.

M.J.L.,
Respondent.

Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

PETITION FOR A WRIT OF CERTIORARI

LESLIE SCHERR
SCHWEITZER, BENTZEN & SCHERR
1225 Eye Street, N.W.
Suite 900
Washington, D.C. 20005
(202) 371-8900

WILLIAM F. HANRAHAN *
STEVEN M. SAXON
ANDREW A. CHAKERES
GROOM AND NORDBERG, Chtd.
1701 Pennsylvania Ave., N.W.
Suite 1200
Washington, D.C. 20006
(202) 857-0620

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

85

QUESTION PRESENTED

Where a state enacts a statute of limitations designed to ensure the stability of adoptive families by protecting the finality of adoption decrees, does it, as the District of Columbia Court of Appeals held, violate the Due Process Clause of the Fifth Amendment to the United States Constitution to bar a putative biological father, who first learned of the entry of the decree within the limitations period, from reopening the decree after the limitations period expires?

LIST OF PARTIES

In addition to the parties listed in the caption, Associated Catholic Charities of the Archdiocese of Washington, D.C., Inc., and Jane Hammitt, Esq., Guardian Ad Litem of M.N.M., appeared in the proceedings below. The District of Columbia Corporation Counsel appeared as amicus curiae.

RULE 29.4(b) STATEMENT

This case involves the constitutionality of D.C. Code Ann. § 16-310. Section 2403(a) of Title 28 of the United States Code may be applicable.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT	2
A. Constitutional and Statutory Background	2
B. Facts and Proceedings	4
REASONS FOR GRANTING THE WRIT	9
I. THE STATES PLACE A HIGH VALUE ON ENSURING THE FINALITY OF ADOPTION DECREES. THE DECISION FOR WHICH REVIEW IS SOUGHT UNDERMINES THAT INTEREST IN FINALITY AND JEOPARDIZES THE STABILITY OF ADOPTIVE FAMILIES BY HOLDING THAT A STATE MAY NOT CONSTITUTIONALLY BAR THE BELATED ASSERTION OF A CLAIM THAT THE ORIGINAL ADOPTION PROCEEDING VIOLATED A CONSTITUTIONALLY PROTECTED RIGHT TO NOTICE OF THE PROCEEDING. THE PRINCIPLE ANNOUNCED BY THE COURT OF APPEALS, IF FOLLOWED NATIONALLY, WOULD DESTROY THE STATES' ABILITY TO FOSTER CERTAINTY IN THE ADOPTION PROCESS	9

TABLE OF CONTENTS—Continued

Page

II. THE STATE COURTS AND ONE UNITED STATES COURT OF APPEALS HAVE REACHED CONFLICTING CONCLUSIONS REGARDING THE CONSTITUTIONALITY OF SIMILAR POST-ADOPTION STATUTES OF LIMITATIONS. THE CONFLICT AMONG THESE DECISIONS AND WITH THE DECISION FOR WHICH REVIEW IS SOUGHT SHOULD BE AUTHORITATIVELY RESOLVED TO PROTECT THE FINALITY OF ADOPTION DECREES THROUGHOUT THE NATION 17

CONCLUSION 21

TABLE OF AUTHORITIES

CASES — Page

Adoption of Knipper, 30 Ohio App. 3d 214, 507 N.E.2d 436 (1986) 18, 19
Appeal of H.R., 581 A.2d 1141 (D.C. App. 1990) .. 11, 19
Armstrong v. Manzo, 380 U.S. 545 (1965) 8, 13-16, 19
Block v. North Dakota, 416 U.S. 273 (1983) 11, 12
Board of Regents v. Tomanio, 446 U.S. 478 (1980) 11
Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945) 12
In re Raquel Marie X., 76 N.Y.2d 387, 559 N.E.2d 418, *cert. denied*, 111 S.Ct. 517 (1990) 19
Lehr v. Robertson, 463 U.S. 248 (1983) ...3, 12, 15, 16, 19
Matter of Adoption of Lori Gay W., 589 P.2d 217, *cert. denied*, 441 U.S. 945 (1979) 18
Michael H. v. Gerald D., 491 U.S. 110 (1989) 3, 18
Michel v. Louisiana, 350 U.S. 91 (1956) 11
Petition to Adopt Baby Boy C., No. A-249-83 (D.C. Super. Ct., January 2, 1992) 11
Quilloin v. Walcott, 434 U.S. 246 (1978) 2
Soriano v. United States, 352 U.S. 270 (1957) 11
Stanley v. Illinois, 405 U.S. 645 (1972) 2
Syrovatka v. Erlich, 608 F.2d 307 (8th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980) 18
Trimble v. Gordon, 430 U.S. 762 (1977) 10
Walter v. August, 186 Cal. App. 2d 395, 8 Cal. Rptr. 778 (Cal. App. 1960) 17
White v. Davis, 163 Colo. 122, 428 P.2d 909 (1967) 18, 19

STATUTES AND RULES

28 U.S.C. § 1257 2
42 U.S.C. § 1983 11
D.C. Code Ann.
§ 16-304 2
§ 16-304(b)(2)(A) 3
§ 16-304(d) 3
§ 16-304(e) 3
§ 16-306 ..... 2, 3
§ 16-307 5

TABLE OF AUTHORITIES—Continued

Page

§ 16-309(f) 4
§ 16-310 ..... *passim*
§ 16-311 4
District of Columbia Adoption Procedure, 68 Stat. 240 (1954) 3, 16
Fed. R. Civ. P. 60(b) 13
Superior Court Rule of Civ. P. 60(b) 13
Tex. Fam. Code Ann. § 16.12 (West 1986) 15

OTHER MATERIAL

Uniform Adoption Act § 15, 9 U.L.A. 11 (1971) 4
Dickson, *The Emerging Rights of Adoptive Parents: Substance or Spector?* 38 UCLA L. Rev. 917 (1991) 9
Family Law—Unwed Fathers' Rights—New York Court of Appeals Mandates Veto Power Over Newborn's Adoption for Unwed Father Who Demonstrates Parental Responsibility, 104 Harv. L. Rev. 800 (1991) 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. ———

ADOPTIVE PARENTS OF M.N.M.,
Petitioners,

v.

M.J.L.,
Respondent.

Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals is reported at 605 A.2d 921 (1992), and is reprinted at pages 1a-28a of the Appendix to this Petition ("Pet. App."). The order of the Superior Court of the District of Columbia from which appeal is taken is reprinted at Pet. App. 29a-46a.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on March 27, 1992, reversing an order of the Superior Court of the District of Columbia, en-

tered on October 1, 1990, denying respondent's motion to intervene and to set aside a decree of adoption. The Court of Appeals denied a timely petition for rehearing en banc on July 9, 1992. Pet. App. 47a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTES INVOLVED

This case involves D.C. Code Ann. §§ 16-304, 16-306, and 16-310 (1989), which are set forth as Pet. App. 48a.

STATEMENT

A. Constitutional and Statutory Background

The District of Columbia and 31 states have adopted post-judgment statutes of limitations that bar any person from challenging the validity of a final decree of adoption beyond a defined period of time, usually one year, after the decree is entered. The District of Columbia Court of Appeals has decided that the District's one year statute cannot constitutionally be applied to bar a putative natural father from challenging the validity of a final adoption decree on due process grounds after the limitations period has expired.

Over the past three decades, this Court has recognized in a variety of situations that the interest in maintaining a relationship between parent and child may be a liberty interest protected by the Due Process Clause of the Fifth Amendment. In most circumstances, a state may not create a procedure that does not afford a biological parent a right to notice and an opportunity to be heard before the state terminates the biological parent's established relationship with the child. *Stanley v. Illinois*, 405 U.S. 645 (1972). But a protected liberty interest in parenthood does not arise automatically from a biological relationship. The biological parent ordinarily must perfect his interest by shouldering the burdens of parenthood by acknowledging the relationship and providing care and support to the child. *Quilloin v. Wal-*

cott, 434 U.S. 246 (1978). At a minimum, a biological parent who has not had an opportunity to develop a relationship with a child must take steps to achieve that relationship by pursuing the legally available avenues for advancing his interests. *Lehr v. Robertson*, 463 U.S. 248 (1983). Even then, the state may validly adopt rules that prohibit the assertion of parental rights under some circumstances. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (upholding California's conclusive presumption that a child born in wedlock is the offspring of the marital union).

Congress enacted a comprehensive adoption statute for the District of Columbia in 1954. 68 Stat. 240 (1954). The statute requires that the biological parents must give their consent to an adoption unless the court concludes that the withholding of consent is contrary to the best interests of the child. D.C. Code Ann. §§ 16-304(b)(2)(A) and 16-304(e). The statute also provides that where a parent whose consent is required cannot be located "after such notice as the court directs," then the consent of that parent is not required. D.C. Code Ann. § 16-304(d). Finally, the statute requires that a parent who does not consent to a proposed adoption be given notice "immediately upon the filing of a petition." D.C. Code Ann. § 16-306. As part of its adoption law, the District of Columbia has enacted a statute of limitations peculiar to adoption decrees.

> An attempt to invalidate a final decree of adoption by reason of a jurisdictional or procedural defect may not be received by any court of the District, unless regularly filed with the court within one year following the date the final decree became effective.

D.C. Code Ann. § 16-310.

Thirty-one states have adopted similar statutes of limitations to protect the finality of adoption decrees after periods generally ranging from six months to five years

following the entry of the decree.[1] For example, four states have adopted, with variations, the Uniform Adoption Act. The Uniform Adoption Act's post-judgment statute of limitations provides that

> . . . Upon the expiration of [one] year after an adoption decree is issued the decree cannot be questioned by any person including the petitioner, *in any manner upon any ground, including* fraud, misrepresentation, *failure to give any required notice*, or lack of jurisdiction of the parties or of the subject matter, unless, in the case of the adoption of a minor the petitioner has not taken custody of the minor, or, in the case of the adoption of an adult, the adult had no knowledge of the decree within the [one] year period.

Unif. Adoption Act § 15, 9 U.L.A. 11 (1971) (emphasis added).

According to the court of appeals, the legislative judgments of these 32 jurisdictions to protect adoptive families from a belated post-judgment attack is repugnant to the Constitution. If the reasoning of the court of appeals is followed, the finality of thousands of adoptions across the country could be affected.

B. Facts and Proceedings

The petitioners are the adoptive parents of baby M.N.M. The respondent, M.J.L., is the putative biological father. The birth mother is L.C.M.[2]

---

[1] Of those thirty-one states, twenty-eight states have a statute of limitations and three states have statutes that specify that a decree of adoption, once final, may not be challenged under any circumstances. A table of state post-adoption statutes is set forth in the Appendix at Pet. App. 51a.

[2] Throughout this proceeding, the petitioners have been identified by the trial and appellate courts only as the adoptive parents of baby M.N.M., in keeping with the District's rules regarding the confidentiality of adoption proceedings. D.C. Code Ann. §§ 16-309(f) and 16-311. The putative biological father and the birth mother have also been referred to only by their initials.

While seniors in high school in St. Louis, Missouri, M.J.L. and L.C.M. allegedly had relations that resulted in L.C.M.'s pregnancy.[3] L.C.M. sought adoption counseling from St. Louis Catholic Charities, but did not place her baby for adoption with that agency. L.C.M. gave birth on July 30, 1987, in a St. Louis hospital. A few days later, on the advice of her parish priest, L.C.M. traveled to Washington, D.C. with her baby and placed the child for adoption with Associated Catholic Charities of the Archdiocese of Washington, Inc. ("Catholic Charities" or the "agency"), which sponsors a child placement agency licensed by the District of Columbia. She executed a relinquishment of parental rights, as provided under the District of Columbia adoption law. She also signed an affidavit that stated that she did not know the whereabouts of the biological father and refused to diclose his identity. She continued to refuse to disclose his identity during questioning by Catholic Charities. Pet. App. 2a-3a.

The baby was placed in the petitioners' home in August, 1987, and the petitioners filed a petition for adoption in the Superior Court of the District of Columbia on November 5, 1987. The court directed Catholic Charities, as the supervising child placement agency, to conduct a post-placement investigation and to file a report required under D.C. Code Ann. § 16-307. In recommending the adoption, the agency advised the court that it had attempted to learn the identity of the biological father, but was unable to do so because L.C.M. refused to disclose any identifying information about him. Pet. App. 3a. The Superior Court entered a final decree of adoption on April 11, 1988. The court did not direct the agency to attempt notification of the father, and did not

---

[3] M.J.L.'s paternity has not been established. There is some evidence that another individual may have fathered the child. Pet. App. 20a. In its order of remand, the court of appeals directed the trial court to resolve this issue as the first order of business. Pet. App. 19a.

make any specific finding that notice was impossible. The agency did not make any further effort to provide notice. Pet. App. 3a-4a.

During the pregnancy, St. Louis Catholic Charities contacted M.J.L. and his parents and advised them that L.C.M. was considering placing the baby for adoption. M.J.L. objected, and expressed a desire to rear the child himself. Pet. App. 2a. L.C.M. disagreed and broke off all avenues of communication with M.J.L. M.J.L. therefore contacted the hospital in which he expected L.C.M. to give birth, identified himself as the father, and asked that the hospital notify him of the birth. Pet. App. 4a, n.4. L.C.M. did give birth at this hospital on July 30, 1987. The hospital did not notify M.J.L. as he requested.

On August 6, 1987, M.J.L. filed a paternity and custody action in St. Louis County court. This action was later dismissed for lack of jurisdiction and failure to prosecute. He refiled the action in January, 1988 in St. Louis City court. In these actions, he deposed both L.C.M. and her father, who refused to disclose any information about the baby or her whereabouts, claiming a privilege against self-incrimination. Pet. App. 3a.

When the St. Louis City court learned that L.C.M. and her father refused to disclose information about the location of the baby, the court asked the St. Louis County Attorney to investigate the matter and attempt to develop information about the baby. In late November 1988, the St. Louis County Attorney's office advised the court that the baby had been placed for adoption through Catholic Charities in Washington, D.C., and that the adoption proceeding had become final. The St. Louis court advised M.J.L.'s attorney of this information in early December, 1988. Pet. App. 4a, 7a, 36a.

In early January, 1989, M.J.L. sent a letter to a majority of the judges of the Superior Court of the Dis-

trict of Columbia. He advised the judges of the circumstances and asked that he be notified of any adoption proceeding involving the child. A judge of the Superior Court's Family Division responded and advised M.J.L. that if such a proceeding were identified, M.J.L. would receive notice. Pet. App. 5a.

On January 23, 1989, the attorney representing M.J.L. in the paternity proceeding in the St. Louis City court advised the court that he intended to file a motion to intervene in the District of Columbia adoption proceeding. Pet. App. 7a.

Four and one half months later, on June 5, 1989, M.J.L. filed a *pro se* motion to intervene in the District of Columbia adoption proceeding and to vacate the adoption decree. This *pro se* filing, made with the assistance of an attorney, came one year and two months after the entry of the final decree of adoption on April 11, 1988. Pet. App. 6a. After consideration of the issues, the District of Columbia Superior Court denied the motion to intervene. The court found that M.J.L. had actual knowledge of the adoption proceeding as early as December 1988, and certainly no later than January, 1989. Pet. App. 10a, 36a. The court concluded that M.J.L.'s motion to intervene and set aside the adoption was barred by D.C. Code Ann. § 16-310, which prohibits any attempt to invalidate a final decree of adoption "by reason of a jurisdictional or procedural defect" unless the challenge is "regularly filed" within one year of the final decree of adoption. Pet. App. 35a.[4]

---

[4] The adoptive parents raised the statute of limitations as a bar to M.J.L.'s motion to intervene in their Reply to Opposition to Intervention, filed on July 26, 1989. M.J.L. filed a *pro se* Reply to Opposition to Intervention on August 7, 1989, arguing that "[t]he Statute of Limitations does not apply if fraud upon the court was involved. . . . My constitutional right as natural father of [M.N.M.] has been violated by the unilateral fraudulent actions of [L.C.M.]." Reply to Opposition to Intervention at 4-5.

M.J.L. appealed to the District of Columbia Court of Appeals, arguing, *inter alia*, that the statute of limitations contained in D.C. Code Ann. § 16-310 violates the Due Process Clause of the Fifth Amendment to the United States Constitution. Pet. App. 54a. A divided panel of the District of Columbia Court of Appeals agreed and reversed. The court first concluded that M.J.L.'s acknowledgment of paternity and offer to take custody, along with his filing of the paternity action in St. Louis and his efforts in the District of Columbia all demonstrated that M.J.L. had taken adequate steps to perfect his liberty interest in his parental relationship, and that this interest was entitled to due process protection. Pet. App. 13a-14a. The court further concluded that, at least under the circumstances here, the actual knowledge of the adoption proceeding which M.J.L. obtained, coupled with the only available procedure under District law for obtaining relief from a final judgment, was not a sufficient post-deprivation hearing adequate to rectify the initial failure to provide prejudgment notice. Pet. App. 16a-19a.

From these premises, the court concluded that the District's one year post-judgment statute of limitations could not constitutionally be applied to foreclose M.J.L.'s challenge to the adoption proceeding. Relying on and quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), the court held "that appellant's right to procedural due process was violated and that he must be 'restored . . . to the position he would have occupied had due process of law been accorded to him in the first place. . . .'" Pet. App. 19a. Although the court acknowledged that "[t]his case presents a conflict between the powerful demand for finality in adoption proceedings reflected in D.C. Code § 16-310 and a serious apparent defect in the adoption order . . . ," Pet. App. 8a, the court did not in fact address that conflict or provide any reasoned explanation for its refusal to enforce the plain terms of the statute of limitations. The court of appeals failed to con-

sider this Court's consistent holdings affirming the constitutional validity of state statutes of limitations generally, and the Court's recognition of the power of the states to prescribe procedures requiring litigants to advance within a time certain claims of federal constitutional violations or lose the right to assert such claims.

REASONS FOR GRANTING THE WRIT

I. THE STATES PLACE A HIGH VALUE ON ENSURING THE FINALITY OF ADOPTION DECREES. THE DECISION FOR WHICH REVIEW IS SOUGHT UNDERMINES THAT INTEREST IN FINALITY AND JEOPARDIZES THE STABILITY OF ADOPTIVE FAMILIES BY HOLDING THAT A STATE MAY NOT CONSTITUTIONALLY BAR THE BELATED ASSERTION OF A CLAIM THAT THE ORIGINAL ADOPTION PROCEEDING VIOLATED A CONSTITUTIONALLY PROTECTED RIGHT TO NOTICE OF THE PROCEEDING. THE PRINCIPLE ANNOUNCED BY THE COURT OF APPEALS, IF FOLLOWED NATIONALLY, WOULD DESTROY THE STATES' ABILITY TO FOSTER CERTAINTY IN THE ADOPTION PROCESS.

The District of Columbia and the vast majority of states have expressed a legislative judgment, embodied in their post-adoption statutes of limitations, that the need for finality in adoption proceedings is, as the court of appeals said, "powerful." The reasons supporting this legislative judgment are obvious. The states have an interest in promoting the stability of family relationships. That interest is particularly acute for adoptive families, whose status is purely a product of statutes which have no antecedent in the common law and which have been developed only within the last century. Dickson, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. Rev. 917, 923-25 (1991). The relationships that are forged and severed by an adoption proceeding are perhaps the most fundamental elements of human

society, and they are relationships that by their nature span generations. Moreover, the objects of the adoption process, children whose interests the state has a special obligation to protect, are plainly the most vulnerable members of society. That the states place special emphasis on protecting the integrity of an adoptive family once it is finally formed under the law is, to say the least, hardly surprising. *See Trimble v. Gordon*, 430 U.S. 762, 769 (1977) ("No one disputes the appropriateness of Illinois' concern with the family unit, perhaps the most fundamental social institution of our society.")

The court of appeals' decision for which review is sought seriously undermines the states' efforts to promote stability and finality in the adoption process. According to the court, the states may not constitutionally adopt a rule of repose to prevent the reopening of an adoption years after the fact where a procedural oversight in the trial court effected a denial of due process to an interested party. According to the court, this is so even where the putative biological father learned of the adoption and announced his intention to intervene well before the limitations period expired, but failed to do so. The court reached this result without any consideration of the well-developed body of law addressing the constitutionality of statutes of limitations, or the decisions of this Court that particularly recognize that states may validly prescribe time limits for the assertion of rights protected by the federal constitution. The importance of the question presented here, and the evident failure of the court of appeals to analyze the competing interests at stake, warrants review by this Court.[5]

---

[5] The dissenting member of the Court of Appeals graphically noted the adverse effects of the decision on the adoption process and on the children whose lives will be profoundly and adversely affected by the lack of finality of their adoption decrees.

Predicting that the decision may "chill locally the movement for adoption," Pet. App. 24a, the dissent reminded the court of the

The court of appeals overlooked a simple precept. "A constitutional claim can become time-barred just as any other claim can. . . . Nothing in the Constitution requires otherwise." *Block v. North Dakota*, 416 U.S. 273, 292 (1983) (citations omitted). The Court has routinely recognized this in actions arising under 42 U.S.C. § 1983, *e.g.*, *Board of Regents v. Tomanio*, 446 U.S. 478 (1980) (claim that the failure to provide a hearing on professional license request violated due process is barred by limitations), and in other contexts where a time-barred claim hinged on a constitutional violation. *E.g.*, *Soriano v. United States*, 352 U.S. 270 (1957) (claim under the Takings Clause barred by limitations).

Similarly, there is no doubt that a state may adopt procedural rules that place a time limit upon the assertion of rights protected under the United States Constitution. *Michel v. Louisiana*, 350 U.S. 91 (1956) (criminal defendant's equal protection challenge to the racial composition of indicting grand jury barred because not timely raised under state procedure).

Had the court of appeals applied these principles in this case, it should have recognized that M.J.L.'s effort to set aside the final decree of adoption was barred by the one year limit in D.C. Code § 16-310. Even though M.J.L.'s claim is grounded upon a deprivation of a constitutional right, it is in substance no different from any

---

findings of the trial court in another pending appeal where an adopted child was at risk of being removed from his adoptive family. Faced with the prospect of the dissolution of his family, the child " 'became anxious and bewildered . . . [h]e felt that he was in the . . . home on a provisional basis. . . . [he] has picked up the anxiety of [the adoptive parents] notwithstanding their best efforts to shield him from their feelings of being threatened by [the natural father's] action . . . . Unavoidably, this case is causing [the child] stress and emotional pain.' " Pet. App. 27a (Gallagher, J., dissenting *quoting Petition to Adopt Baby Boy C.*, No. A-249-83 (D.C. Super. Ct., January 2, 1992), opinion on remand of *Appeal of H.R.*, 581 A.2d 1141 (D.C. 1990)).

other claim for relief placed before the judiciary for resolution. The legislature may prescribe a period of time within which such a claim must be presented or be lost. *Block v. North Dakota*, 461 U.S. at 292; *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). M.J.L. simply did not file his claim on time.

Instead of addressing this simple question of timeliness, the court of appeals engaged in an elaborate examination of the statutory and constitutional dimensions of the notice requirements for unwed putative fathers. First, it considered whether, as a matter of statutory interpretation, M.J.L.'s letters to the judges of the Family Court requesting information about the adoption proceeding, submitted within the one year limitations period, could be deemed a timely assertion of his claim. The court correctly decided that a letter requesting information about a proceeding did not satisfy the statute's exacting requirement that "any challenge" to a final decree be "regularly filed" within a certain period, a conclusion buttressed by ". . . the clear legislative intent to impose finality on [the adoption] process." Pet. App. 9a. Similarly, the court could ". . . discern no "equitable tolling" principle that suspends application of the limitations bar. . . ." *Id.*

Finding that ". . . resort to statutory construction cannot spare us the need to address the constitutional questions . . . ." Pet. App. 9a, the court examined whether M.J.L. had taken adequate steps to perfect and preserve his liberty interest in his parental relationship with the baby. In *Lehr v. Robertson*, 463 U.S. 248, 262 (1983), this Court made clear that a biological relationship, standing alone, is not inevitably a protected liberty interest under the Due Process Clause. Rather, a biological parent who had not formed an actual parental relationship with the child must demonstrate by his affirmative acts that he has grasped the opportunity to develop a relationship with his offspring in order to merit

due process protection. The court of appeals here concluded that M.J.L. had perfected a constitutionally protected interest by manifesting his willingness to support and take custody of the child, by filing his custody actions in the St. Louis courts, and by endeavoring to intervene in the District of Columbia adoption proceeding. Further, the court concluded that M.J.L.'s failure to file a timely motion for relief from the final adoption decree did not demonstrate that M.J.L. had abandoned his opportunity interest. The court therefore concluded that M.J.L. was entitled to prior notice of, and an opportunity to be heard in, adoption proceeding. Pet. App. 13a-14a.

The court of appeals then considered whether the actual knowledge of the adoption proceeding that M.J.L. obtained, coupled with the District's general procedure for obtaining relief from a final judgment, provided an adequate post-deprivation remedy sufficient to satisfy due process. The court concluded that the only available procedure for attacking a final judgment—Superior Court Rule of Civil Procedure 60(b), which is substantially identical to Fed. R. Civ. P. 60(b)—placed an additional evidentiary burden on M.J.L. that he would not have suffered had he had an opportunity to participate in the original adoption proceeding. Therefore, the court reasoned, the availability of the procedure under Rule 60(b), at least under the circumstances here, did not serve to rectify the initial due process violation. Pet. App. 18a.

From these premises, the court then announced that "[w]e therefore hold that appellant's right to procedural due process was violated and that he must be 'restored . . . to the position he would have occupied had due process of law been accorded to him in the first place.' *Armstrong* [*v. Manzo*], 380 U.S. at 552." Pet. App. 19a. The court thus refused to give effect to the statute of limitations, which plainly barred M.J.L.'s untimely claim, evidently

reasoning that as applied to him, the limitations statute was repugnant to the Due Process Clause.

The court's reliance on *Armstrong v. Manzo* for this remarkable conclusion is misplaced. *Armstrong* involved a post-judgment attack, brought well within the limitations period, upon an adoption decree entered without notice to the child's father. In that case, the parents of the child divorced, and the mother was awarded custody and the father was obliged to provide support. The mother remarried and consented to an adoption of the child by her new husband. Texas law required consent of the natural father as a predicate to adoption, unless the proponents of adoption proved that the natural father had failed to provide support to the child for the preceding two years. Without notice to the father, the mother filed an affidavit of nonsupport, and on the strength of this affidavit, the adoption court found that the father's consent was not required. The adoption court then entered a decree of adoption, again without notice to the father. The father learned of the adoption decree within days of its entry and promptly filed a motion to set aside the adoption decree on the grounds that he had not been given notice of the proceeding. The adoption court, without setting aside the decree, conducted a hearing on the motion, and placed on the father the burden of proving that he had provided adequate support to the child. The court found that the father failed to carry this burden of proof, and concluded that he was not entitled to notice of the original proceeding. The court therefore refused to set aside the decree. 380 U.S. at 547-49.

This Court reversed, holding first that the father was entitled, as a matter of elementary due process, to notice of the filing of the petition for adoption. *Id.* at 550. The Court then considered whether the hearing afforded to the father on his motion to set aside the decree offered a post-deprivation opportunity to challenge the judgment sufficient to satisfy due process. The Court concluded that

this post-judgment hearing was constitutionally deficient, because it shifted to the father the burden of proving that he had provided adequate support to the child for the period preceding the adoption, where a contrary burden would have rested with the adoptors if the matter had been considered in the proper adversarial context in the first instance. The Court therefore directed the adoption court to set aside the adoption decree and consider the matter anew, with the evidentiary burden placed upon the proponents of adoption. *Id.* at 551-52.

Plainly absent from this Court's consideration of the issues in *Armstrong* was any reason to examine the effect of the Texas post-judgment statute of limitations, which then and now provides that "[t]he validity of an adoption decree is not subject to attack more than two years after the decree is entered." Tex. Fam. Code Ann. § 16.12 (West 1986). The father learned of the final decree of adoption within days of its entry, and "promptly" filed his post-judgment challenge. *Armstrong*, 380 U.S. at 548. The only relevant question addressed in the *Armstrong* decision was the adequacy of the Texas procedure for obtaining relief from a final judgment, where that procedure had been timely invoked. This Court concluded that the post-judgment remedy was insufficient. Nothing in *Armstrong* even arguably supports the notion that an untimely demand for relief is entitled to special constitutional protection. And nothing in the court of appeals' decision here explains why a party with actual knowledge of an adoption proceeding obtained within the limitations period should be afforded an unlimited time to file a challenge to the finality of the decree.[6]

---

[6] The court of appeals seems also to have relied for its holding on *Lehr v. Robertson*, 463 U.S. 248 (1983), noting early in its opinion that ". . . if the facts had been that appellant, through no neglect of his own, was denied notice of the adoption either before it took place or within the following year, *Lehr v. Robertson* leaves

The court of appeals's misplaced reliance on *Armstrong* flies in the face of the legislative judgment that the finality of adoption decrees is entitled to special protection. When Congress originally enacted the adoption statute for the District, it declared that among the purposes of the legislation was the ". . . socially necessary and desirable protection . . . of . . . the adopting parents . . . [by] protecting them from subsequent disturbance of their relationships with the child by natural parents." 68 Stat. 240, 241 (1954). To accomplish that purpose Congress decided that an adoption decree, once final and confirmed by the passage of time, may not be challenged on any basis, including jurisdictional or procedural defects in the initial proceeding.

The wisdom of that judgment is readily apparent from the circumstances of this case. Baby M.N.M. was placed with her adoptive parents within three weeks of her birth. Pet. App. 21a. The only immediate family that she has known are her parents and her older brother, who himself is an adopted child. She has developed in this setting, protected by the power of the state and its courts to ensure that nothing would upset these relationships. Now, five years after the formation of this family, M.N.M., her parents, her brother and the extended family of which she is a part face the possibility that the judicial power of the United States will destroy

---

little doubt that the statute could not constitutionally be enforced against him." Op. at 9-10.

Lehr provides no support for the court's conclusion. *Lehr* involved a challenge to the New York adoption procedure that did not require notice of an adoption to an unwed natural father unless the father made his interest in the child known by registering his parental claim in the state's putative father registry. The putative father failed to take advantage of this procedure, and this Court found no constitutional defect in the state procedure. *Lehr*, 463 U.S. at 264. The case did not address the timeliness of the father's assertion of his claim; the issue was whether the state's statutory procedure of conditioning the obligation to provide notice on registration satisfied Due Process. *Id.* at 262-63.

this family to correct a mistake by a trial court that failed to make a finding regarding the feasibility of notice to the putative natural father. Congress and the legislatures of 31 states decided that this outcome should not be allowed. Nothing in the Constitution invalidates that judgment. This Court should therefore grant review to set aside this improvident decision.

II. THE STATE COURTS AND ONE UNITED STATES COURT OF APPEALS HAVE REACHED CONFLICTING CONCLUSIONS REGARDING THE CONSTITUTIONALITY OF SIMILAR POST-ADOPTION STATUTES OF LIMITATIONS. THE CONFLICT AMONG THESE DECISIONS AND WITH THE DECISION FOR WHICH REVIEW IS SOUGHT SHOULD BE AUTHORITATIVELY RESOLVED TO PROTECT THE FINALITY OF ADOPTION DECREES THROUGHOUT THE NATION.

Four state appellate courts and the United States Court of Appeals for the Eighth Circuit have considered the constitutionality of substantially similar state statutes of limitations aimed at preserving the finality of adoption decrees. Three of these courts have upheld the validity of the state statutes. Two courts have agreed with the District of Columbia Court of Appeals and invalidated the application of the statute because of a lack of prejudgment notice. This conflict should be resolved.

The California Court of Appeals upheld California's post-adoption statute of limitations against a challenge that the application of the statute to natural parents who did not receive notice of the adoption proceeding denied them due process of law. Viewing the issue as one of the jurisdiction of the adoption court to proceed without notice to an affected party, the court correctly concluded that ". . . jurisdictional defects can be cured, in effect, by statutes of limitation. . . .", and found no merit to the claimed due process violation. *Walter v. August*, 186 Cal. App. 2d 395, 8 Cal. Rptr. 778 (Cal. App. 1960).

The Supreme Court of Oklahoma upheld the constitutionality of Oklahoma's one year statute of limitations against a due process challenge. However, the court there believed it necessary to interpret the statute to include a discovery rule that tolled the commencement of the limitations period until the natural parent learned of the entry of the adoption order. As so interpreted, the court found no due process violation in applying the statute's bar to an action to set aside an adoption brought more than one year after the natural mother obtained actual knowledge of the adoption. *Matter of Adoption of Lori Gay W.*, 589 P.2d 217, *cert. denied*, 441 U.S. 945 (1979).

The United States Court of Appeals for the Eighth Circuit upheld a Nebraska statute establishing a conclusive presumption of validity of an adoption decree unless challenged within two years of its entry. The court of appeals viewed the constitutional issue as one of substantive due process. The court found that Nebraska had ". . . a legitimate and important interest in establishing a stable environment for adopted children. . . .," and concluded that the conclusive presumption arising after two years ". . . has a reasonable relation to this legitimate state purpose." *Syrovatka v. Erlich*, 608 F.2d 307, 311 (8th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980).[7]

Two courts have reached the same conclusion as the District of Columbia Court of Appeals. In *Adoption of Knipper*, 30 Ohio App.3d 214, 507 N.E.2d 436 (1986), the Ohio Court of Appeals ruled that the state's one year post-adoption statute of limitations violated due process as applied to a natural parent who did not receive notice

---

[7] Similarly, this Court has upheld California's "conclusive presumption" that a husband is the father of a child born in wedlock against the claim of the biological father that this rule denied him a liberty interest protected by the Due Process Clause. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

of the proceeding before the entry of the decree. The Colorado Supreme Court took a similar approach to its post-adoption statute. *White v. Davis*, 163 Colo. 122, 428 P.2d 909 (1967). Like the District of Columbia court, the Ohio and Colorado courts believed that this result was dictated by the decision in *Armstrong v. Manzo*. *Knipper*, 507 N.E.2d at 438; *White*, 428 P.2d at 911. But as we have shown, *Armstrong* provides no support for this conclusion.

The conflict among these decisions is evident. And the emergence of the line of authority represented by *Knipper*, *White*, and the case at bar presents a disturbing trend that warrants review by this Court. The bulk of the states that have adopted statutes designed to protect the stability of adoptive families have not yet seen their courts grapple with the constitutional issue presented here. But it is probable that the state courts will be called upon to examine the question with increasing frequency as the courts address the unsettled questions regarding the parental rights of unwed biological fathers.

The recognition that a biological father may, under some circumstances, enjoy a constitutionally protected liberty interest in his inchoate parental relationship with his child is of comparatively recent origin. *Lehr v. Robertson*, 463 U.S. 248 (1983). Indeed, the existence and scope of any constitutional protection for an unwed father whose child is placed for adoption immediately after birth is only now being examined by the state appellate courts. *E.g.*, *In re Raquel Marie X.*, 76 N.Y.2d 387, 559 N.E.2d 418, *cert. denied*, 111 S.Ct. 517 (1990) (invalidating requirement that unwed father must have lived with the child's mother in order to object to adoption); *Appeal of H.R.*, 581 A.2d 1141 (D.C. App. 1990) (unwed, nonresident natural father's procedural due process rights violated by failure to give prior notice of adoption proceeding); Note, *Family Law—Unwed Fathers' Rights—New York Court of Appeals Mandates*

Veto Power Over NewBorn's Adoption for Unwed Father Who Demonstrates Parental Responsibility, 104 Harv. L. Rev. 800 (1991).

As the courts attempt to flesh out the scope of this interest and define the circumstances under which it arises, it is likely that they will be repeatedly confronted with facts similar to those presented here. It takes no special experience to appreciate that birth mothers all too frequently refuse, or are unable, to provide adoption agencies, the adoptive parents, or the courts with information about the identity of the biological father. The consequence of this reluctance or inability to disclose highly personal and often embarrassing information is to sow the seeds of potential disaster for all involved.

Birth fathers who attempt to grasp their opportunity interest in the parental relationship may, in reality, be thwarted. Meanwhile, adoptive parents, who seek to cement a bond with children whose circumstances are distressed and uncertain, rely upon the courts to provide certainty in the family relationship. Congress and the states have endeavored to protect that relationship by imposing a time limit upon those who would seek to unsettle the parental bond. The possibility that the courts will misread this Court's decisions defining the inchoate liberty interest, demonstrated in the decision at bar, counsels swift action by the Court to provide guidance on this important question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LESLIE SCHERR
SCHWEITZER, BENTZEN
& SCHERR
1225 Eye Street, N.W.
Suite 900
Washington, D.C. 20005
(202) 371-8900

WILLIAM F. HANRAHAN *
STEVEN M. SAXON
ANDREW A. CHAKERES
GROOM AND NORDBERG, Chtd.
1701 Pennsylvania Ave., N.W.
Suite 1200
Washington, D.C. 20006
(202) 857-0620

* Counsel of Record

Dated: October 7, 1992

APPENDIX

TABLE OF CONTENTS

Page

Opinion of the District of Columbia Court of Appeals in *In re M.N.M.*, 605 A.2d 921 (D.C. 1992) 1a

Order of the Superior Court of the District of Columbia Family Division in *In the Matter of: M.N.M.*, A-252-87 (Super. Ct., October 1, 1990) 29a

Order of the District of Columbia Court of Appeals denying motion for rehearing filed in *In the Matter of: M.N.M.*, No. 90-FS-1395 (D.C., July 9, 1992) 47a

Statutes Involved

D.C. Code Ann. § 16-304 (1989) 48a
D.C. Code Ann. § 16-306 (1989) 49a
D.C. Code Ann. § 16-310 (1989) 50a

Other Material

Table of State Statutes of Limitations 51a

Excerpts from Brief of Appellant filed in *In re: M.N.M.*, No. 90-1395 (D.C.) 53a

APPENDIX

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 90-1395

IN RE M.N.M., M.J.L., APPELLANT

Appeal from the Superior Court of the
District of Columbia

(Hon. Warren R. King, Trial Judge)

(Argued November 25, 1991 Decided March 27, 1992)

Harvey Schweitzer, with whom *James A. Shrybman* and *Edith R. Blackwell* were on the brief, for appellant.

Stanton Phillips for appellees.

Before SCHWELB and FARRELL, *Associate Judges*, and GALLAGHER, *Senior Judge*.

Dissenting opinion by *Senior Judge* GALLAGHER at p. 20.

FARRELL, *Associate Judge*: In this appeal we face once again a challenge by the putative natural father (appellant) to a final decree of adoption entered even though, as the trial judge acknowledged, "the natural father was given no notice of the adoption proceedings." The judge concluded that the putative father's motion to intervene in the adoption proceeding was barred by the one year statute of limitations governing attempts to invalidate a final decree of adoption. D.C. Code § 16-310 (1989). We hold that appellant had a constitutionally protected interest in fair notice of, and opportunity to participate in,

the adoption proceedings because he timely grasped his "opportunity interest," *Lehr v. Robertson*, 463 U.S. 248 (1983), in rearing the child he claims to have fathered. We further hold that he was denied that notice and opportunity, and that—assuming his paternity is established, a matter which remains in dispute—these rights must be accorded him before this adoption may become final. We express no opinion on the ultimate issue of whether the adoption entered by the trial court is in the best interests of the child. D.C. Code § 16-309(a)(3).

I.

Appellant M.J.L. claims to be the biological father of a female child (M.N.M.) born in St. Louis, Missouri on July 30, 1987.[1] According to appellant, he and the child's natural mother, L.C.M., had a relationship while both were seniors in high school, resulting in the birth of the child. It appears undisputed that early in June 1987, the mother and her parents met with a social worker employed by St. Louis Catholic Charities, and the mother stated her desire to give up the child she was carrying for adoption. Appellant claims that he and his parents were contacted by St. Louis Catholic Charities and that he asserted he was the father, opposed the adoption, and expressed his desire to raise the child.[2] On July 29, 1987,

---

[1] So far as the record reveals, M.J.L.'s paternity has not yet been established. The mother disputes it, and obviously any voice to which appellant may be entitled in the adoption proceeding is contingent upon his first establishing paternity.

[2] In setting forth his version of the discussions between St. Louis Catholic Charities and the natural mother, as well as between the agency and himself, appellant relies on an unsigned, un-notarized deposition of a social worker at St. Louis Catholic Charities included in the record on appeal. Appellees ask us to ignore the deposition, which we largely do; but appellees have never proffered facts contradicting appellant's assertion that he claimed paternity and opposed the adoption once informed of the impending birth by St. Louis Catholic Charities.

one day before the birth, L.C.M.'s father contacted appellees, Associated Catholic Charities of the Archdiocese of Washington, D.C., Inc. (hereafter the adoption agency), a licensed adoption agency in the District of Columbia, and arranged to put the child up for adoption in the District of Columbia. On August 3, 1987, the child, the mother and her father arrived in the District. The baby was placed in a pre-adoption home on August 4, 1987. On the same day, L.C.M. signed an affidavit stating that although she knew who the natural father was, she did not know his whereabouts and would not identify him.

On August 6, 1987, appellant filed a parternity and custody action in St. Louis County in an attempt to halt any adoption. In the District, the adoption process continued, with the baby being placed in an adoptive home on August 20, 1987. On January 1, 1988, appellant re-filed his paternity and custody action [3] this time in St. Louis City, the mother's place of residence. In connection with his lawsuits, appellant deposed L.C.M.'s father on September 17, 1987 and L.C.M. on February 12, 1988, in an attempt to locate the child. Both refused to answer any questions about the child or its whereabouts.

On November 5, 1987, the adoptive parents (also appellees in this appeal) had filed a petition for adoption in the Superior Court of the District of Columbia. In furtherance of this petition, the adoption agency filed its report on February 19, 1988, in which it stated that it had attempted to learn the name of the natural father from L.C.M., but that she refused to provide it. After inquiring into her reasons for the refusal, the agency apparently concluded that they were sufficient and recommended to the court that the adoption go forward. The record does not reveal any effort by the adoption agency, other than questioning L.C.M., to identify or locate appel-

---

[3] The original suit was dismissed for lack of jurisdiction and failure to prosecute.

lant, to notify him of the pending adoption proceeding, or to gain his consent to the adoption, although both notice and consent of the natural father are required by statute, D.C. Code §§ 16-304, -306.[4] The trial court entered a final adoption decree on April 11, 1988. The record contains no order requiring that notice to appellant be attempted, nor a finding by the court that efforts to notify appellant would be futile. D.C. Code § 16-304 (d).

In St. Louis, appellant proceeded with his suit before Judge Robert G. Dowd, Jr. On September 23, 1988, a hearing was held before a special master in the presence of appellant, the mother, and her father. The special master found that L.C.M. and her father still refused to provide information about the location of the baby. and concluded that the suit could not be settled and should proceed to trial. In late October 1988, the office of the St. Louis County Attorney informed apellant that it was aware of adoption proceedings concerning the child in the District of Columbia, but furnished him no specific information about the proceeding such as the court or docket number. On November 14, 1988, Judge Dowd entered an order instructing the County Attorney to give appellant any information he had about the child.

Shortly after January 6, 1989, the majority of the Superior Court judges, including the trial judge presiding over the adoption of M.N.M., received a letter signed by appellant stating he had learned from Judge Dowd

---

[4] Appellees contend that any such efforts would have been futile. For example, appellees claim that Associated Catholic Charities was unaware of the participation of St. Louis Catholic Charities in the adoption process. The adoption report, however, reflects that the D.C. adoption agency knew at which hospital the child had been born. Appellant maintains that he had contacted the hospital repeatedly, including by hand-delivered letter, to request that it call him as soon as the child was born, giving both his telephone number and the number of the social worker at St. Louis Catholic Charities. In view of our disposition, it is unnecessary for the court to resolve this factual dispute.

that, according to the St. Louis County Attorney, the child M.N.M. "has been put up for adoption in the Washington, D.C. area through the Catholic Charities Organization." The letter pointed out that appellant's paternity case would be heard by Judge Dowd in early 1989, and continued:

> Right now I am very concerned about the adoption being finalized and the associated waiting period expiring before my case can be heard. I need someone in the Washington D.C. Superior Court to be aware of the truth in this situation so that a fair decision can be made. Catholic Charities of Washington D.C.—fearing liability—wants a court order to open any records or even to acknowledge their role in the adoption process. I cannot file a petition to prevent/set aside the adoption because I don't know in which court the adoption is taking place.
>
> * * * *
>
> I realize that there are numerous regulations preventing the release of records in adoption cases, so I am not asking you to do that. However, I am asking that if this case is or was before you in Washington D.C. Superior Court to please contact one of the following [listed persons] so I may have my day in court.

On January 12, 1989, a Family Division judge in receipt of appellant's letter responded by stating that "appropriate notices will be given if the adoption matter to which [appellant] refers is currently pending in this court." A second trial court judge informed appellant that, unless he furnished a designated docket number, no search through Superior Court records could be accomplished. On January 18, 1989, Judge Mencher, then Presiding Judge of the Family Division of Superior Court, wrote Judge Dowd in St. Louis requesting information—including pleadings and transcripts—about the case assertedly pending before him involving appellant. Judge

Dowd apparently shared the letter with appellant or his St. Louis counsel, because on February 5, 1989, appellant wrote Judge Mencher and enclosed the pleadings and depositions from the St. Louis lawsuit. Judge Dowd also responded to Judge Mencher on February 16, 1989, stating that he expected appellant to file suit in the District of Columbia. The one year statute of limitations governing attacks on final adoption decrees expired April 11, 1989.

On April 17, 1989, appellant wrote to Judge Mencher asking whether he should file pleadings in the District of Columbia and requesting the court and docket number for the adoption proceeding. On April 18, Judge Mencher informed appellant of the trial judge before whom the adoption case was pending; a letter sent to appellant by the Chief Deputy Clerk of the Family Division on May 12, 1989, provided the docket number of the case. On June 5, 1989, appellant filed a *pro se* motion to intervene in the adoption proceeding, alleging fraud, lack of notice, and constitutional violations. This filing came one month and twenty four days after the statute of limitations had expired.

The trial judge ordered responses on June 13, 1989. On November 8 he asked the Office of Corporation Counsel to file an amicus brief, which was filed on January 24, 1990. On April 20, 1990, Judge Dowd wrote to the trial judge enclosing an order for blood tests to determine paternity which had been entered in the St. Louis suit on February 5, requesting that the order be given full faith and credit. A guardian ad litem was appointed for the child on June 27, 1990.

II.

In a memorandum opinion filed on October 1, 1990, the trial judge denied appellant's motion to intervene and declined to give full faith and credit to Judge Dowd's order for blood tests. The judge addressed only the fact that the statute of limitations for attacking a final adop-

tion decree had expired.[5] He also denied appellant relief under Rule 60 (b) of the Superior Court Rules of Civil Procedure, stating that because Rule 60 applied only to parties and appellant was being denied party status, Rule 60 was not available as a way around the statute of limitations.

The judge reasoned that although judges of the Superior Court were "aware" of appellant's claims as early as January 1989, appellant had failed to "regularly file" anything, as required by the statute, until after the one-year limitation period had run. The judge stated:

> The sanctity of the adoption process can be preserved only by requiring strict adherence to procedural rules. *See* 16 D.C. Code Section 309-311; *In re Wells*, 281 F.2d 68 (D.C. 1960). Until petitioner formally filed his Motion to Intervene, the Court could not know that he intended to actively pursue intervention in the adoption matter. The formal declaration of intention, however, came too late even though his counsel had much earlier indicated to Judge Dowd that he would by filing the necessary pleadings.

The judge found that appellant and his St. Louis attorney had been informed by Judge Dowd in early December that the child had recently been adopted in the District of Columbia; and that on January 23, 1989, appellant's attorney told Judge Dowd of his intent to file a motion to set aside the adoption in the District. Yet the motion had not been filed until more than four months later. Appellant's correspondence with the Superior Court judges in

---

[5] The statute of limitations states:

> An attempt to invalidate a final degree of adoption by reason of a jurisdictional or procedural defect may not be received by any court of the District, unless *regularly filed with* the court within *one year following the date the final decree became effective.*

D.C. Code § 16-310 (emphasis added).

early January, the judge found, "was not 'regularly filed' as required by the statute; it was simply a request for information." The judge therefore denied the motion to intervene, denied full faith and credit to Judge Dowd's order directing appellant and the child to undergo blood testing, and rescinded his own previous order which had "indicat[ed] an inclination" to have such testing conducted.

III.

A.

This case presents a conflict between the powerful demand for finality in adoption proceedings reflected in D.C. Code § 16-310 and a serious apparent defect in the adoption order, namely, the failure to give notice of the pendency of the adoption proceedings to the putative natural father. We conclude that we must undertake the constitutional analysis required by *Lehr v. Robertson*, 463 U.S. 248 (1983), to decide whether appellant may claim a protected due process interest in the outcome of the adoption proceeding and, if so, whether he was denied that process. *See Appeal of H.R.*, 581 A.2d 1141 (D.C. 1990). We address at the outset, however, appellant's claim that we need not pursue the constitutional inquiry because the trial judge erred in concluding that appellant had not "regularly filed" an opposition to the adoption decree within one year of its effective date, as required by D.C. Code § 16-310.

To avoid the constitutional problem, appellant urges us to construe § 16-310 flexibly to embrace letters such as those mailed to the judges in January 1989, expressing his objection to "the adoption being finalized." Indeed, he points out, one judge of the Superior Court replied essentially by telling him that the letter would serve as "notice" of his position to the adoption court if the case involving the child M.N.M. were in fact pending in Superior Court. We are unpersuaded by this argu-

ment. The trial judge correctly ruled that appellant's letter was not the motion or pleading "regularly filed" with the court which § 16-310 requires. The judge found the letter to be "simply a request for information." Even if it was something more than that, the judge was certainly correct in reasoning that it "was not the type of document which would call for a formal response by adopting parents/Associated Catholic Charities." Judges of the Superior Court receive numerous *pro se* letters in the course of a year stating real or imagined grievances and requesting information about cases; here the letter apparently was sent to all, or nearly all, of the trial judges. We are not disposed to construe such letters as motions "regularly filed" with the court so as to trigger reciprocal filing obligations by other affected parties. Particularly as concerns adoptions, as the trial judge recognized, a relaxed reading of the "regularly filed" requirement is incompatible with the clear legislative intent to impose finality on that process. Consequently, resort to statutory construction cannot spare us the need to address the constitutional questions in this case. *Cf. Crowell v. Benson*, 285 U.S. 22, 62 (1932) (statutory construction to avoid constitutional question must be "fairly possible"). We turn then to the due process issues.

B.

Section 16-310 by its terms is intended to close the door on attempts to invalidate final adoption decrees after one year. Like the trial judge, we can discern no "equitable tolling" principle that suspends application of the limitations bar when an informal letter such as we have here is asked to do service for the formal filing commanded by the statute. Nevertheless, if the facts had been that appellant, through no neglect of his own, was denied notice of the adoption either before it took place or within the following year, *Lehr v. Robertson* leaves little doubt that the statute could not constitutionally be enforced against him. The trial judge appeared to recog-

nize this but found that appellant, through his St. Louis counsel, had been aware since December 1988 or at least January 1989—three months before the statute of limitations ran—of the adoption in the District of Columbia. Under D.C. Code § 17-305(a) (1989), we must credit that finding. We therefore face two questions. First, were appellant's actions such that he may legitimately claim due process protection and hence require the court to decide whether the notice he received was adequate under the Constitution? Second, if so, did the actual notice he received comport with due process (or "cure" any earlier denial of due process) so as to justify application of the bar of limitations to his claim?

Lehr teaches that the first inquiry is whether the natural father has grasped his "opportunity interest" in claiming the obligations and satisfactions of parenthood. *Appeal of H.R.*, 581 A.2d at 1160 (opinion of Ferren, J.).

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.

Lehr, 463 U.S. at 262. In *Lehr*, the Court held that a natural father of a child born out of wedlock, who for two years before the adoption petition was filed "never had any significant custodial, personal, or financial relationship" with the child and failed to utilize a statutorily created putative father registry that would have given him automatic notice of all proceedings concerning the child, had not grasped his opportunity interest and

thus had no claim to constitutional protection of his rights regarding the child. *Id.* at 262, 264-65.

Appellant argues, as he did in the trial court, that his efforts to assume responsibility for the child M.N.M. began before the child's birth when he learned of the prospective mother's intent to place the child for adoption, and declared his opposition to that plan and desire instead to raise the child himself. Appellees question the factual basis for these representations, *see* note 2, *supra*, but they are given credibility by the undisputed fact that appellant filed a paternity and custody action in St. Louis County a week after the child's birth. He seasonably deposed the mother's father (who was instrumental in relocating the child to the District of Columbia) in an unsuccessful effort to locate the child. After refiling his suit in the St. Louis City court in January 1988, he deposed the mother for the same purpose and to like effect. When the mother and her father continued to keep the child's whereabouts secret, a special master, in September 1988, recommended that the Missouri case proceed to trial. Meanwhile, in the District of Columbia, the adoption went forward to completion in April 1988 without any notice to appellant. Only in October did he begin to receive information which enabled the trial judge to find that, by the beginning of January 1989, appellant knew the child had been adopted in the District.

Appellant acted on this knowledge by sending the letter to the judges of the Superior Court summarized above,[6] stating that he could not "file a petition to prevent/set aside the adoption because I don't know in which court the adoption is taking place." A month later, after the Chief Judge of the Family Division contacted Judge

---

[6] Earlier, in October 1988, the record shows that he wrote similar letters of inquiry to federal district courts in Virginia and Maryland. The letter itself suggests that he had also contacted Associated Catholic Charities in Washington but had been refused any information without a court order requiring it.

Dowd (who then apparently spoke with appellant or his attorney), appellant forwarded the pleadings and depositions from the St. Louis action to the Chief Judge, who in turn, on April 18, advised appellant of the name of the trial judge handling the adoption case; and on May 12 the clerk informed appellant of the docket number. Appellant's motion to set aside the adoption was filed on June 5.

Appellees argue that, notwithstanding these actions by appellant, he essentially abandoned his "opportunity interest" from December 1988 to June 1989 because he possessed enough information by December or January to have told Judge Dowd of his intent to file suit in the District of Columbia, presumably in the near future. Appellees argue that his subsequent behavior—writing letters to the court and forwarding pleadings, instead of filing formal and timely objection to the adoption—is tantamout to the vincible ignorance which the Supreme Court in *Lehr* found insufficient to excuse the petitioner's noncompliance with New York's procedures governing adoption. *See* 463 U.S. at 264 ("The possibility that [petitioner] may have failed to [enroll himself in the putative father registry] because of his ignorance of the law cannot be a sufficient reason for criticizing the law itself").

We do not find the factual comparison with *Lehr* apt. In *Lehr* the father never sought "to establish a legal tie until after [the child] was two years old," *id.* at 260; appellant, by contrast, filed suit one week after the child's birth to establish paternity and claim the child as his. Moreover, the District of Columbia does not have a putative father registry of the kind that, in *Lehr*, placed "the right to receive notice [before the adoption took place] . . . completely within [the petitioner's] control" by the simple act of mailing a postcard. *Id.* at 264. Appellant received notice, months after the fact, only by his own initiative in filing and pursuing the paternity suit in the

St. Louis courts. And he did so despite the conceded efforts of the mother and her parents acquiesced in by the adoption agency to keep him in the dark. *See Appeal of H.R.*, 581 A.2d at 1164-65 (opinion of Ferren, J.) (discussing significance of "state action" by licensed adoption agency in denying parent access to child and knowledge of proceedings). Finally, although we have no occasion here to assess blame to the mother and her parents for moving the child from St. Louis to the District of Columbia, we would ignore reality if we overlooked the difficulties this created for appellant (even aided by counsel) in seeking to learn and comply with the procedures of another state for moving to set aside an adoption decree. Appellant received varying responses to his letter requesting information from the Superior Court; more than one of these replies could have lulled him into believing he had lodged the necessary objection with the court. See page 5, *supra*.

All told, we are persuaded that appellant "early on, and continually," asserted his paternity and the right to assume the obligations of fathering M.N.M. *Appeal of H.R.*, 581 A.2d at 1161 (opinion of Ferren, J.); *see also id.* at 1205 (opinion of Belson, J.). No claim is made that he was indifferent to the welfare of the child or the mother during the pre-natal stage, compare *In re Adoption of Doe*, 543 So. 2d 741 (Fla. 1989) (cited in *Appeal of H.R.*, 581 A.2d at 1162, opinion of Ferren, J.). And because the child, without his knowledge, was placed in the custody of the adoption agency almost from the moment of birth, he had no opportunity to "develop a relationship with his offspring," *Lehr*, 463 U.S. at 262, which he can be said to have abandoned by his subsequent conduct. The adoption went forward in the District of Columbia while appellant pursued the only means available to him to learn the child's whereabouts and prevent an adoption—filing suit in St. Louis and deposing the mother and her father without success. Of greatest sig-

nificance, he was denied entirely the statutory notice of the filing of the adoption petition required by District of Columbia law. *Appeal of H.R.*, 581 A.2d at 1165 (opinion of Ferren, J.) (stressing "statutory right to immediate notice in evaluating whether [father] grasped his opportunity interest"); *id.* at 1189 n.14 (opinion of Rogers, C.J.) ("statutory right to immediate notice of an adoption proceeding . . . is a critical factor in deciding whether [father] seized his opportunity interest"). We hold that appellant sufficiently asserted his parental interest and therefore may claim "substantial protection under the Due Process Clause." *Lehr*, 463 U.S. at 261.

C.

We turn to the questions of what process appellant was entitled to, and whether it was denied him. In *Armstrong v. Manzo*, 380 U.S. 545 (1965), an adoption case, the Supreme Court concluded: "It is clear that failure to give [the natural parent] notice of the *pending* adoption proceedings violated the most rudimentary demands of due process of law." *Id.* at 550 (emphasis added). In the District of Columbia, the notice required by due process is set forth statutorily. "Consent to a proposed adoption of a person under eighteen years of age is necessary . . . from both parents, if they are both alive . . . ." D.C. Code § 16-304(b)(2)(A). To implement this requirement, "due notice of pending adoption proceedings shall be given to each person whose consent is necessary thereto, immediately upon filing of a petition. D.C. Code § 16-306(a). But consent of a parent may be dispensed with if, "after such notice as the court directs," a parent cannot be located or has abandoned the child. D.C. Code § 16-304(d).

Appellees do not contend that the adoption agency attempted to notify appellant of the pending proceedings or that the trial court directed notice to him of the pro-

ceeding (or found that such notice would be futile).[7] Appellees also do not assert this to be a case in which fears about the safety of the child or other persons justified concealing the proposed adoption from the father. This court has not had occasion to decide whether extra-statutory concerns such as these might justify refusal to give a natural parent notice; we assume for present purposes that they may. But in view of the fundamental right at stake of a parent who has grasped his opportunity interest, *Lehr*, 463 U.S. at 261, such concerns would surely have to be exceptional before an adoption could be approved without the parent having been contacted or given the opportunity to be heard on the matter. The reasons the mother gave here—and the adoption agency accepted—for concealing the proceedings from appellant fall well short of this exceptional showing; we do not understand appellees to argue otherwise.[8] Consequently,

---

[7] Appellees cite *In re Wells*, 108 U.S. App. D.C. 235, 281 F.2d 68 (1960), as supporting the proposition that this court has enforced the statute of limitations even where no notice of the adoption was given to the natural parent and the natural parent's consent had not been given. The court there did enforce the statute of limitations to block the unsealing of adoption records three years after the adoption was instituted. *Id.* at 237, 281 F.2d at 70. But in *Wells* the natural mother's consent, and notice to her, were never required. The natural mother's parental rights had been terminated in a proceeding forty five days after the child was born, and the child had been placed in the permanent custody of the Department of Public Welfare. *Id.* at 236, 281 F.2d at 69. Notice to and the consent of a natural parent whose parental rights have been terminated is not required; consent of "a licensed child-placing agency or the Commissioners in case the parental rights of the parent or parents have been terminated by any court of competent jurisdiction" is all that is necessary under D.C. Code § 16-213 (1960); *see also* D.C. Code § 16-304(b)(2)(D). Thus, in *Wells* the statutory prerequisites to a valid adoption had been met.

[8] The adoption report filed with the court adverts to the mother's fear of possible violence by the father toward himself or others if he learned of the proposed adoption. But those concerns are broadly stated and have never been substantiated on the record; and ap-

the failure to notify appellant in disregard of the statute would appear, without more, to violate his right to due process. *Appeal of H.R.*, 581 A.2d at 1169 (opinion of Ferren, J.) (father's "statutory—*and constitutional*—right to notice . . . was violated when the court failed to provide him with immediate notice of the filing of the . . . petition" as required by statute) (emphasis added; original emphasis deleted); *id.* at 1188 (opinion of Rogers, C.J.) (statutory requirement of immedate notice to natural parent "meets the requirement of due process as defined by *Lehr*").

Appellees contend, nonetheless, that whatever violation of due process resulted from the failure to notify appellant of the pending adoption was overcome by the actual notice he received by early January 1989, which should have allowed him to challenge the adoption in proper form before the statute of limitations expired in April. Due process, they argue, is satisfied *either* by notice to the parent before the adoption decree is entered *or* by notice at least sufficient to permit the parent to intervene before the curtain of finality is lowered by the statute of limitations. A similar argument was made in *Armstrong v. Manzo*, *supra*. There the state appellate court had ruled "that whatever constitutional infirmity resulted from the failure to give the petitioner notice had been cured by the hearing subsequently afforded to him upon his motion to set aside the [adoption] decree." 380 U.S. at 550-51. The Supreme Court rejected this conclusion after comparing the burdens the parent faced in having to move to set aside the final decree with those the parties *favoring* adoption would have faced had he been given pre-adoption

---

pellees do not rely on them on appeal. The report also states that the mother and her parents wished to retain the confidentiality of the pregnancy and that they were experiencing family problems that would be compounded by involving the alleged father. These reasons are insufficient on their face as grounds for excluding the father from the adoption process.

notice.[9] The Court held that only by setting aside the adoption decree and requiring *de novo* consideration of the petition could the father be "restored . . . to the position he would have occupied had due process of law been accorded to him in the first place." *Id.* at 552.

Title 16 of the D.C. Code, as the trial judge recognized, contains no procedural format for moving to set aside a final decree of adoption. Section 16-310 merely provides that "[*a*]*n attempt* to invalidate a final decree of adoption by reason of a . . . procedural defect may not be received . . . unless regularly filed with the court within one year . . ." (emphasis added).[10] Thus, to set aside the adoption in this case, appellant had to move for relief

---

[9] Had the petitioner been given the timely notice which the Constitution requires, the Manzos, as the moving parties, would have had the burden of proving their case as against whatever defenses the petitioner might have interposed. It would have been incumbent upon them to show not only that Salvatore Manzo met all the requisites of an adoptive parent under Texas law, but also to prove why the petitioner's consent to the adoption was not required. Had neither side offered any evidence, those who initiated the adoption proceedings could not have prevailed.

Instead, the petitioner was faced on his first appearance in the courtroom with the task of overcoming an adverse decree entered by one judge, based upon a finding of non-support made by another judge. As the record shows, there was placed upon the petitioner the burden of affirmatively showing that he had contributed to the support of his daughter to the limit of his financial ability over the period involved. The burdens thus placed upon the petitioner were real, not purely theoretical. For "it is plain that there the burden of proof lies may be decisive of the outcome." Yet these burdens would not have been imposed upon him had he been given timely notice in accord with the Constitution.

Armstrong v. Manzo, 380 U.S. at 551 (internal citations omitted).

[10] By contrast, under D.C. Code § 16-309(e) the trial court "may revoke its *interlocutory* decree for good cause shown at any time before it becomes a final decree . . ." (emphasis added).

from judgment within one year setting forth grounds under Rule 60 (b) of the Superior Court Rules of Civil Procedure. *See also* Super. Ct. Dom. Rel. R. 60 (b). As in *Armstrong* it seems evident that the burden he faced would have been higher than the burden *appellees* would have faced at the original adoption proceeding had he been present contesting the adoption. *See Appeal of H.R.*, 581 A.2d at 1189 (opinion of Rogers, C.J.) (as between natural parent who has seized his opportunity interest "and strangers to the child, the burden of proof is on the strangers to show by clear and convincing evidence that the best interest of the child requires custody be placed with the strangers"; this burden "will not be easily met where the parent is deemed to be fit").

But we need not hold that, in light of this altered burden, notice received by a natural parent for the first time after the adoption is final *necessarily* cannot cure a due process violation. At a minimum, the actual notice and opportunity to challenge the decree must be manifest before it can be held to overcome the complete denial of pre-adoption notice. A different rule would provide an incentive to parties to delay notice to a parent until such time (*i.e.*, after the final decree) as the objecting party must demonstrate diligence in attacking it. Appellant learned of the adoption in the District in early January, three months before the statute of limitations expired. His ensuing conduct must be evaluated in the setting described earlier, *viz.*, in which he was required to comply with the procedures in a distant jurisdiction for filing proper objection, and in which replies by the Superior Court to his letter of January 6 could have suggested to him reasonably that his objection had been registered. (Hence, in response to the request by the Presiding Judge of the Family Division to Judge Dowd for transcripts and pleadings in appellant's Missouri case, appellant promptly forwarded these to the Superior Court well within the statute of limitations.) In sum, while appel-

lant's pursuit of his claim in the District of Columbia after January 6 was perhaps maladroit, we cannot hold that it amounted to forfeiture of his opportunity to challenge the final adoption. Compliance with the requirement of pre-adoption notice is vital because, much like the statute of limitations itself, it insures that the best interest of the child will be determined once and for all.[11] To hold that the notice appellant received was timely enough to cure his exclusion from the pre-adoption process would make light of this statutory imperative.

D.

We therefore hold that appellant's right to procedural due process was violated and that he must be "restored . . . to the position he would have occupied had due process of law been accorded to him in the first place." *Armstrong*, 380 U.S. at 552. But we repeat the cautionary point made at the beginning: the issue here is not whether the adoption ordered is in the best interest of this child. As we noted previously, *supra* note 1, appellant's paternity remains in dispute; before anything else takes place, the parties and the trial court must resolve that question. Furthermore, many factors must be evaluated in deciding what disposition is best for this child, including the fact that he has lived with the adoptive parents for more than four years. We hold only that, assuming paternity, appellant must be accorded the opportunity to voice "his opinion of where the child's best interests lie," *Lehr*, 463 U.S. at 262.

Judgment vacated and case remanded for further proceedings consistent with this opinion.

---

[11] Where competing parties in the proceeding are given opportunity for a thorough hearing, and the petition is vigorously advocated and contested, and witnesses are cross-examined, the interests of the adoptee can be fully presented to the court. *In re Adoption of a Female Infant*, 237 A.2d 468, 470 (D.C. 1968).

GALLAGHER, *Senior Judge*, dissenting. In deciding this case, I believe we should do so on the entire record as we now find it and not on the basis of the record as it stood when the adoption proceeding was commenced. It would be more in accordance with the realities of this proceeding. As matters now stand, for example, the indication from a St. Louis deposition is that another young man (not appellant) had sexual relations with the teenage mother at a crucial time in relation to the birth, as later explained. This factor makes questionable appellant's reference to himself as the father of the child, as this is an open question. As a matter of fact, it was appellant who submitted to the court the deposition of the second youth. Yet, inexplicably, he nevertheless continues to take the flat position that he is the father.

I view this unique record rather differently than the majority. Unquestionably, the statutory notice of the adoption proceeding was not given to appellant and, standing alone, this may raise a procedural due process issue. But he and his St. Louis attorney had actual knowledge of the local adoption proceeding here for several months before the motion to intervene in the adoption proceeding in the local trial court was filed and yet took no legal action to further his interest until it was too late. His experienced counsel would have had no serious difficulty tracing the proceeding. It would be an elementary problem for counsel, perhaps a matter of a few phone calls.

This case is further complicated by the reality that we have two potential fathers of the adopted child. The first is the young appellant. The other is a young man who, during a deposition in the St. Louis parentage proceeding instituted by appellant, has stated that he had sexual relations with the then seventeen-year-old mother on at least two occasions, once late in the last week in October 1986 (at a Halloween Party), preceding the July 30, 1987 birth of the child, and again in early November 1986. The child was born on July 30, 1987, and the record shows

the pregnancy of the mother to have been full term. One or both of the asserted relations with the second young man (not appellant) were in the critical period for the pregnancy resulting in the birth on July 30, 1987. Notwithstanding this, appellant flatly asserts parenthood even though he has been aware of the second young man's deposition in the St. Louis proceeding since January 27, 1990. Parenthetically, the second young man indicated he has no interest in assuming parental responsibility for the child.

So, we have at this juncture a rather complex set of facts. On the one hand, we have two potential natural fathers, one of whom is pressing for parentage rights. On the other hand, so far as it appears, the child is situated in a happy adopted home environment where she has been since she was about two weeks old and she is now nearing five years of age. Reopening of the adoption proceeding would seriously affect the child and the adoptive parents.

Appellant started pressing for parentage rights, when, while in his teens, he learned of the pregnancy. At the time, neither his parents nor the teenage mother's parents believed either the teenage boy (appellant) or girl were fit to parent the child. However, the young putative father later instituted a parentage proceeding in St. Louis, Missouri, where he and the child's mother resided, soon after he learned of the child's birth. He retained a law firm there to represent him in the proceeding. His attorney continued to represent him over a long period and, in fact, represented him at least as late as the deposition of the second potential father in the St. Louis proceeding, and there cross-examined that youth on January 27, 1990. He is also represented by counsel on this appeal.

Importantly, his attorney represented to the presiding judge in St. Louis on or before January 23, 1989, that he intended to file a motion by appellant to intervene in the

adoption proceeding in this city, but several months went by and this was not done. Instead, appellant himself wrote many letters to many local judges. If the motion had been filed at any time within three months after his attorney stated the motion would be filed, it would have been inside the local statutory period in relation to the adoption proceeding. But the motion to intervene was not filed until about six months after his St. Louis attorney announced to the St. Louis court his intention to file. By then, it was too late. Instead, there was more than a six month period for unaccountable delay after he learned of the local adoption, even though the attorney continued to represent him in the parentage proceeding in St. Louis at that time.[1]

I am unable to view this record as portraying a young man floundering alone in a legal maze and not being able to ascertain in which court in Washington, D.C. the adoption proceeding was pending or what to do about it. He was represented in St. Louis at all pertinent times by experienced counsel. This is apparent from the record before us. It is something of a mystery on this record as to why, having learned of the local adoption proceeding, he did not, as his counsel announced to the St. Louis court, pursue his parentage claim in our trial court proceeding during all those months, but instead waited until it was much too late and then filed the motion.[2] The statute of limitations had then run. His actions, or failure to act, belied his expressed desire to parent the child. Yet, at all times he was represented by counsel.

---

[1] Appellant learned of the adoption in this city on December 1, 1988. He filed the motion to intervene on June 5, 1989.

[2] The trial judge in this proceeding observed that the motion to intervene that was finally filed *pro se* actually appeared to have been prepared with the aid of legal advice. I too have the impression that there was professional participation in filings by appellant contained in the record of this proceeding at the trial court level. On this appeal, he is represented by counsel.

So, we have the involved human equation of a young man recurringly anxious to establish he is the natural father of the now nearly five-year-old adopted girl. He is a putative father who was not given statutory notice of the local adoption proceeding to which he was entitled. Yet, he had actual knowledge of the adoption proceeding, as did his St. Louis lawyer who was representing him in the proceeding in progress there to establish his parentage. "It is well settled that notification *purposed to inform* may be replaced by actual knowledge." *Clark v. Wolman*, 221 A.2d 687, 688 (Md. App. 1966) (citing 1 MERRILL, NOTICE, 480).

Meanwhile, another young man in St. Louis has admitted he had sexual relations with the young natural mother at a time which, upon computation, we know would be crucial to the birth.[3] The problem is further deepened by the reality that the little girl being struggled over is now almost five and has lived with her adopted parents in a seemingly happy home since she was a week or two old. Her adoptive parents have been parents to her all those years and probably could not bear the thought of losing her.

These are the realities, and they should all be considered in deciding what to do about this proceeding at this time. The majority says appellant was denied procedural due process and he must be "restored to the position he would have occupied had due process of law been accorded to him in the first place." This is explained as a holding here that " 'appellant must be accorded the opportunity to voice' his opinion of where the child's best interests lie." This is qualified by a requirement that appellant must first establish his parentage by a blood test.

---

[3] He testified he had relations at a Halloween Party (October 31st) and the full term birth occurred the following July 30th. He testified also that he had relations in early November, after the Halloween Party.

I, on the other hand, view the problem as being more complicated than purely the issue arising from statutory notice deprivation. The failure of statutory notice must surely be factored into resolution of the ultimate issue. But I would deal also with the realities. First, appellant and his lawyer hung back all that time after learning of the local adoption proceeding and represented to the St. Louis court that a motion would be filed in the local adoption proceeding here, before actually moving to intervene. They waited until it was three months past the expiration of the statute of limitations to file the motion.[4] Second, there is a strong public interest in protecting the finality of adoption decrees. This is because prospective adoptive parents could not reasonably be expected to pursue this interest if after the whole long process is ended, they may nevertheless sometime in the future lose their adopted child to one claiming a higher priority, *e.g.*, a putative natural parent. This case presents a classical example of how this may occur. If adoptive parents are at risk of losing an adopted child under the circumstances here presented, this might chill locally the movement toward child adoption. So, there is a strong public interest in protecting the finality of adoption decrees once the stattue of limitations period has expired. *In re Wells*, 108 U.S. App. D.C. 235, 281 F.2d 68 (1960). This was the essence of the trial court's holding in this proceeding.

I.

The majority appears to be holding that the letter writing engaged in by appellant in this proceeding, while represented by counsel in St. Louis concerning the same parentage issue, satisfies the provisions of the local statute of limitations. This statute provides:

> An attempt to invalidate *a final decree of adoption by reason of a jurisdictional or procedural de-*

---

[4] *See* note 1, *supra*.

> *fect may not be received* by any court of the District, *unless regularly filed* with the court within one year following the date the final decree became effective.

D.C. Code § 16-310 (1989 Repl.) (emphasis added).

As is seen, that statute is rigid in its requirement that an attempt to invalidate a final decree of adoption must be "regularly filed." It does not require only that it be filed, but has the unusual terminology that it be "regularly filed" within the one year period commencing with the entry of a final decree of adoption. This unusual grace period doubtless stems from histories of such disputes where custody disputes frequently arise between the unmarried parents.

Normally statutes of limitation commence to run in the period before the commenceemnt of the litigation. It is important to consider that here the one year statute commences *after* the final decree of adoption, not before. It will be noted that the statute even goes so far as to specify that even "a jurisdictional" or procedural attack may not be received after the one year expiration; and within the one year period, the attack must be "regularly filed."

It is evident that these strict requirements are there because after a final decree of adoption, one would be seeking to remove a child from an established family. Here, for example, the child has been in the family since she was two or three weeks old and is now nearing five. It is entirely reasonable that this statute of limitations, which comes into play only after a final decree, would be tightly written. And I suggest the plain language should be construed the same way.

So, this court is faced squarely with an issue requiring construction of the local statute. The "regularly filed" requirement has been construed to mean documents considered a part of the record proper. In *Territory v.*

Pinney, 114 Pac. Rept. 367 (Sup. Ct. New Mex. 1910), the court stated "regularly" means in a regular manner, in "a way or method accordant to rule or established mode." *See also* Words & Phrases, Vol. 36A at 276 (1962 ed.).

It would appear that in this proceeding various trial judges, some being members of the Family Division of the trial court, did not consider that the letters from appellant constituted a "regular" filing in the Family Division during the period in which they were received. Otherwise, the filing would have been directed in the normal fashion, and this would have avoided the statute of limitations stricture. As a matter of public policy, in the interest of the stability of human affairs in relation to a permanent parent-child relationship, the legislature specifically provided for a hard and fast cut-off date of one year after the *final decree* of adoption. A statute of limitations is "a public policy about the privilege to litigate." *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). Not only do we have the unequivocal public policy delineated in the one year statute, but we know also that appellant had ample opportunity to move within the statutory period and did not do so.

If, as it appears, this court is necessarily establishing an important precedent in the matter of a construction of the rigid one year statute of limitations in adoption proceedings, I suggest the court should make this evident in its opinion in this case by squaring it wtih the stringent terms of the statute. I believe this court's holding may have a far-reaching impact in Family Division considerations of future adoption proceedings. And it may well be that the court may wish to delineate its reasoning on this aspect of the case because of the potential ramifications of a less than literal interpretation of the precise and studied language used in the statute. I do not believe we should tiptoe around it.

For my part, however, I would leave this adoption in repose.

II.

Since the proceeding is going to be reopened, however, it might not be amiss to offer some comments regarding the remand procedure. I say this particularly because we have at our elbow the experience of the remand proceeding in the trial court resulting from this court's remand in *Appeal of H.R. (In re Baby Boy C.)*, 581 A.2d 1141 (D.C. 1990). After the evidentiary hearing on remand in that proceeding (Case No. A-249-83, Superior Court), the trial judge wrote a learned opinion which should not go unnoticed in this proceeding, in particular, as the fundamental issue is much the same in the two cases. *(See In re Petition to Adopt Baby Boy C.*, No. A-249-83, Memorandum Opinion and Judgment (D.C. Super. Ct. January 3, 1992) (Zeldon, J.))

The experience of *Baby Boy C* was that upon learning of the remand proceeding in the trial court, the child "became anxious and bewildered . . . [f]or a time he developed a nervous tic in his eye . . . [h]e felt that he was in the . . . home of on a provisional basis." (*Id.*, Memorandum Opinion at 8) The trial judge then goes on to state that the child wondered, "I'll always stay in this family won't I, even if I meet my father, my natural father?" (*Id.* at 9.) The trial judge stated also that the child "has picked up the anxiety of [the adoptive parents] notwithstanding their best eqorts to shield him from their feelings of being threatened by [the natural father's] action . . . . Unavoidably, this case is causing [the child] stress and emotional pain." *Id.* at 8-9.

Using this background experience here, it would seem that, if avoidable, the adoptive family relationship should not be intruded upon until there is no other recourse in complying with the remand instructions. This is what I meant by that.

If on remand it is first established by blood tests that appellant is the natural father, the problem would then arise as to how to proceed from there. More importantly, there would be the question of how deeply to intrude into the adopted family.

Assuming the blood test established appellant's paternity, it strikes me that, in this particular case, the trial court might consider thoroughly exploring first appellant's fitness as a parent for the child, *e.g.*, an examination of his stability, maturity, his ability to provide a home and to raise the child, and the real reason for his long delay on the intervention, even though he was represented by counsel. This exploration of appellant's fitness could be conducted without seriously upsetting the child's present adopted home life. That is, the naturally stress-inducing investigation directed toward the child and the adopted home, *e.g.*, child psychoanalysis, home investigation, and the like, could be postponed until appellant's fitness as a parent has been established. In other words, it might be that the remand problem could be resolved without causing the "stress and emotional pain" in the adopted home that was encountered in the *Baby Boy C* remand proceeding, *supra*. If not, and appellant first demonstrates he would be a stable, mature, responsible parent who would provide a sound, secure family environment for the child, then the usual, intrusive adopted family exploration would be unavoidable, after which the balancing process would follow, *i.e.*, weighing the parentage interest of the biological father with the best interest of the child.[5]

---

[5] In this respect, I found the analytical approach of the trial judge in the *Baby Boy C* remand proceeding, *supra*, to be quite impressive.

SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
Family Division

A-252-87

IN THE MATTER OF: M—— N—— M——

ORDER

[Entered Oct. 1, 1990]

On April 11, 1988, this Court signed a Final Decree of Adoption of a female child based upon a petition filed by the adopting parents and a Report prepared by Associated Catholic Charities. The natural mother of the child consented to the adoption; however, she did not reveal the name of the natural father. As a result, the natural father was given no notice of the adoption proceedings.

PROCEDURAL HISTORY

In January, 1989, this judge, most judges of this Court, and some judges of the District of Columbia Court of Appeals received an essentially identical letter from one M—— J. L—— of St. Louis, Missouri, in which he claimed to be the natural father of a female child born to the same natural mother whose child was the subject of the adoption proceeding cited above (Attachment 1). He claimed the natural mother, her mother, and her grandfather had thwarted his efforts to locate the child. He indicated his desire to be heard concerning any adoption proceeding that may be pending involving the child, and he reported the pendency of an action in a court in St. Louis, Missouri, before one Judge Dowd involving his claim to paternity of the child.

On January 18, 1989, The Honorable Bruce Mencher, Presiding Judge of the Family Division of this Court, by letter, requested information from Judge Robert G. Dowd, Jr., Presiding Judge, Juvenile Division of the Circuit Court in the city of St. Louis, Missouri, regarding the pendency of matters in his Court involving Mr. L——.

Judge Dowd shared Judge Mencher's letter with counsel in the case pending before him and on February 5, 1989, Mr. L—— wrote Judge Mencher enclosing pleadings, depositions, and other papers in a case initially filed in St. Louis County. The material revealed that the case was either refiled in, or transferred to, the Circuit Court in the City of St. Louis, and ultimately assigned to Judge Dowd. Mr. L—— was represented in both the county court and the city court by Attorney William P. Grant. Mr. Grant had conducted several depositions and filed some pleadings in addition to the complaint.

Judge Dowd responded to Judge Mencher's letter on February 16, 1989. He enclosed pleadings and papers in the case before him as had Mr. L——. The material provided indicated that the proceeding was commenced by the filing of a Petition for Declaration of Paternity and Order of Custody by Mr. L——'s attorney, with the putative mother and child named as defendants. In his letter transmitting the pleadings to Judge Mencher, Judge Dowd noted: "I understand plaintiff's attorney is or will take steps to file certain pleadings in your Court prior to proceeding on the case here in St. Louis," (Attachment 2).

On April 18, 1989, Judge Mencher informed Mr. L—— that the adoption case was assigned to the undersigned judge and advised him how pleadings could be filed. Thereafter, Mr. L——solicited recommendations regarding attorneys to represent him from Mr. H. Edward Ricks, Chief Deputy Clerk, Family Division. On May 12, 1989, Mr. Ricks informed Mr. L——he was not permitted

to make such recommendations; however, he did provide the names of several lawyers who regularly practice in this court.

On June 5, 1989, Mr. L—— filed a *pro se* [1] Motion to Intervene as a Party (Motion to Intervene) in the adoption matter referred to in the first paragraph of this Order. He maintained he was the natural father of the child, that he should be awarded custody of the child, and that any adoption proceeding should be set aside. The Court directed the adopting parents and Associated Catholic Charities to reply. They did so in a joint Opposition to Intervention filed on July 17, 1989. Mr. L—— filed a Reply to Opposition to Intervention (Reply to Opposition) on July 27, 1989. Adopting parents/Associated Catholic Charities filed a Response to Movant's Reply on August 24, 1989. Finally, Mr. L—— filed a Response to Agency's Reply on September 6, 1989.

The Court then began its review of the pleadings and the associated material provided by the parties. It became apparent that a disinterested assessment of the legal and equitable issues presented would be of assistance to the Court. Mr. L—— had obviously received some legal advice before filing his original pleading in this Court; however, his subsequent filings were consistent with those prepared by someone who had received no training in the law. The pleadings of the adopting parents/Associated Catholic Charities of course reflected their own point of view. The Court believed it would be helpful to secure the assistance of a friend of Court. The Corporation Counsel of the District of Columbia agreed to assist, and on November 8, 1989, the Court issued on Order directing that Office to file a brief. Due to counsel's

---

[1] The motion filed by I—— is not signed by an attorney; however, it was obviously prepared by someone who has had legal training. Also, Mr. L——advised this Court in a letter dated July 31, 1989, that he was being advised by an attorney.

illness, the time for filing was extended, and on January 25, 1990, the brief was filed.[2]

Again, the Court reviewed the pleadings which prompted an inquiry by this Court on April 11, 1990 (Attachment 3), to Judge Dowd concerning aspects of the case pending before him. Specifically, this Court inquired of Judge Dowd whether he had informed the parties of information he had received in November, 1989, concerning the status of adoption proceedings involving the child. Judge Dowd had been informed by the Assistant Circuit Attorney on November 23, 1989, that adoption proceedings had been recently finalized in the District of Columbia (Attachment 4). Judge Dowd responded to this Court's inquiry on April 20, 1990 (Attachment 5). In his response, Judge Dowd also requested that this Court give full faith and credit to an Order for Blood Tests issued by him. In that order he directed Mr. L—— and the child to undergo blood tests for use in determining paternity.

That request by Judge Dowd belatedly caused this Court to realize that it should appoint a guardian ad litem for the child. For a variety of reasons a suitable guardian ad litem could not be appointed until June 27, 1990. The Court then directed adopting parents/Associated Catholic Charities and the guardian ad litem to submit their views concerning both Judge Dowd's request and this Court's then inclination to order blood tests by the putative father and child in this case as well (Order of June 18, 1990). Adopting parents/Associated Catholic Charities filed its memorandum in response on July 18,

---

[2] The Court wishes to acknowledge the cooperation of the Office of the Corporation Counsel, Mr. Michael Cobb, and Mr. Henning Vent, who actually prepared the brief. The Court's request for assistance came at a time when the Office of the Corporation Counsel was greatly understaffed and overburdened by its day-to-day case work The Court appreciates the hardship borne by Mr. Vent, Mr. Cobb, and their associates in responding to the Court's request.

1990, and guardian ad litem filed its position on July 23, 1990. Petitioner L—— filed his Memorandum in Opposition to the Position Stated by Adopting Parents/Associated Catholic Charities on August 9, 1990.

STATUTE OF LIMITATIONS

The principal ground raised by adopting parents/Associated Catholic Charities to petitioner's Motion to Intervene is that it is barred by the applicable statute of limitations. They cite 16 D.C. Code 310 which provides—

> An attempt to invalidate a final decree of adoption by reason of a jurisdictional or procedural defect may not be received by any court of the District, unless regularly filed with the court within one year following the date the final decree became effective.

It is not disputed that the Motion to Intervene was filed more than one year after the adoption decree was entered by this Court. Therefore, petitioner's Motion must fail unless some grounds exist that would permit the Court to either toll the running of the statute or to determine that its application in this case would be inappropriate. Petitioner makes several claims in an effort to persuade this Court to do just that. Specifically, he claims that a fraud was committed, and, therefore, the adoption was illegal since he was never notified of the proceedings (Reply to Opposition pp. 2-3). He also avers that this Court has been aware of his claim of paternity since January, 1989, when a number of judges of this Court received letters from him stating his interest, and, as a result, the time filing requirement of the statute of limitations was met. (Response to Agency's Reply pp. 2-4)

Petitioner cites no authority for the proposition that the fraud he claims was committed in this case would allow the Court to ignore the statute of limitaion. If his Motion to Intervene were granted, a claim of fraud might

serve as a basis for setting aside the judgment pursuant to Superior Court Civil Rule 60(b)(1) or (3) or (6).[3] He can avail himself of that provision, however, only if he is a party, and he can become a party only if the Court grants his Motion to Intervene. The Court is aware of no authority; however, and petitioner cites none that would permit intervention beyond the period set forth in the statute of limitations on that ground.

Next petitioner claims that this Court was "aware" of his claim. Specifically, he maintains that the flurry of correspondence between petitioner and judges of this court, and the exchange of correspondence between Judge Mencher of this court and Judge Dowd in St. Louis were sufficient to put the Court on notice of his claims in time to avoid opposition to his request under any statute of limitations. To be "aware", however, is not enough. The applicable statute requires that an attempt to set aside a final decree of adoption must be "*regularly filed* with the court within one year . . ." (emphasis added). Petitioner's letters to various judges of this court do not constitute the regular filing of a pleading seeking relief. This Court is aware of those authorities requiring trial courts to hold *pro se* pleadings to less stringent standards than formal pleadings drafted by lawyers. *Harris v. Kearns*, 404 U.S. 519 (1972); *Cosgrove v. United States*, 411 A. 2d 57 (D.C. 1980). That requirement, however, applies to pleadings regularly and properly filed with the court, not correspondence to a judge of the court seeking information.

Nor would it be appropriate to consider the correspondence from Mr. L—— to be a "pleading" meeting the

---

[3] It provides:

> On motion and upon such terms are just, the Court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (3) fraud . . . , misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment.

requirements of 16 D.C. Code Section 310. As noted, the correspondence was not "regularly filed" as required by the statute; it was simply a request for information. Further, it certainly was not the type of document which would call for a formal response by adopting parents/ Associated Catholic Charities. Finally, petitioner's attorney in St. Louis clearly understood that the correspondence from Mr. L—— did not constitute a formal pleading since he recognized the need, and informed Judge Dowd in January, 1989, of his intention to file a formal Motion to Intervene in this court (Attachments 2 and 5). That was several months before the expiration of the statute of limitation.

The sanctity of the adoption process can be preserved only by requiring strict adherence to procedural rules. *See* 16 D.C. Code Section 309-311; *In Re Wells*, 281 F.2d 68 (D.C. 1960). Until petitioner formally filed his Motion to Intervene, the Court could not know that he intended to actively pursue intervention in the adoption matter. The formal declaration of intention, however, came too late even though his counsel had much earlier indicated to Judge Dowd that he would be filing the necessary pleadings.

This conclusion is buttressed by the following: In January, 1989, when Mr. L—— sent his letters to judges of this court he was represented by counsel, Mr. William P. Grant, in litigation seeking to establish paternity in St. Louis. Both he and his attorney had been informed[4]

---

[4] Mr. L—— claims that although Judge Dowd informed his attorney that adoption proceedings were underway in the general geographic area, he did not inform him of the specific jurisdiction (Response to Agency's Reply p 1). That assertion is contrary to what Judge Dowd advised Judge Mencher and the undersigned in his letters of February 16, 1989, and April 20, 1990 (Attachments 2 and 5), and the information provided by opposing counsel in the case pending in St. Louis. Specifically, opposing counsel in that case informed counsel for adopting parents/Associated Catholic Charities in this case, that the correspondence (Attachment 4) advising

by Judge Dowd in early December that the child had recently been adopted in the District of Columbia (Attachments 4 and 5). Further, on January 23, 1989, Mr. L——'s attorney informed Judge Dowd of his intention to file a Motion to Set Aside the Adoption in the District (Attachments 2 and 5). Mr. Grant never filed that motion, and no motion was ever filed until after the applicable time period had expired.

In conclusion, the Court finds that the petitioner's motion was not filed within one year after the date of entry of the Order granting the adoption. Further, petitioner has cited no authority or other basis that would entitle him to avoid operation of the requirements of that provision.[5] Accordingly, the Motion to Intervene must be denied.

Judge Dowd that adoption proceedings were "recently finalized in D.C." was provided to Mr. L——'s counsel around December 1, 1988 (Exhibit B to Response to Movant's Reply). Finally, Mr. L——'s attorney informed Judge Dowd on January 23, 1989, of his intention to file a Motion to Set Aside the Adoption in D.C. (Exhibit C to Response to Movant's Reply and Attachment 5). That was nearly 3 months before the statute of limitations would expire.

[5] In his letter to this court of April 20, 1990 (Attachment 5), Judge Dowd requested that this Court give full faith and credit to an order issued by him in petitioner's case in the Circuit Court of St. Louis. It is this Court's view that it has no authority to do so. The order in question directs petitioner and the child to undergo blood testing in order to establish paternity. That order is not a final judgment and, therefore, is not entitled to full faith and credit. See, *Everett v. Everett*, 215 U.S. 203 (1909); *Mills v. Duryee*, 11 U.S. 481, 485 (1813); *Lynde v. Lynde*, 181 U.S. 183 (1901); *Sistare v. Sistare*, 218 U.S. 1 (1909). Further, there are significant unresolved issues regarding jurisdiction over the child. *Adam v. Saeger*, 303 U.S. 59 (1937). For these reasons the request is respectfully denied.

In its order of June 18, 1990, this Court indicated an inclination to order Mr. L—— and the child to undergo blood testing in this case. In light of the Court's ruling, denial of the Motion to Intervene, the Court is of the view that to order testing would be inappropriate and unnecessary.

Therefore, it is this 28 day of September, 1990,

ORDERED that petitioner's Motion to Intervene is denied.

/s/ Warren R. King
WARREN R. KING
Judge

ATTACHMENT 1

January 6, 1989

Judge WARREN R KING
500 Indiana Avenue N.W.
Washington, D.C. 20001

I am writing you because there may be an adoption case before you in which fraud is involved. I am the father of 17 month old M——N——M——. Her mother and grandfather removed her from Missouri shortly after birth and have hidden her from me. I have only recently learned from Judge Dowd in St. Louis City Court that according to the St. Louis Prosecuting Attorney that M—— has been put up for adoption in the Washington D.C. area through the Catholic Charities organization.

M——'s mother and grandfather have successfully thwarted my attempts on learning her whereabouts by pleading the 5th amendment them during depositions. (Yet the State has not filed criminal charges because they believe that jurisdiction would lie in Washington D.C.) However, the paternity case will finally get a hearing before Judge Dowd in early 1989. Right now I am very concerned about the adoption being finalized and the associated waiting period expiring before my case can be heard. I need someone in the Washington D.C. Superior Court to be aware of the truth in this situation so that a fair decision can be made. Catholic Charities of Washington D.C. —fearing liability—wants a court order to open any records or even to acknowledge their role in the adoption process. I cannot file a petition to prevent/set aside the adoption because I don't know in which court the adoption is taking place. I have a sworn deposition from Catholic Charities in St. Louis, who were going to handle the adoption until I made it known that I wanted to parent the child. The social worker at Catholic Charities in St. Louis says in a sworn deposition that she contacted me after M——'s mother (L——) and grandfather

(T—— M——) named me as the only one who could be the father of M——.

I realize that there are numerous regulations preventing the release of records in adoption cases, so I am not asking you to do that. However, I am asking that if this case is or was before you in Washington D.C. Superior Court to please contact one of the following so I may have my day in court. Otherwise M——'s mother and grandfather have unilaterally decided that I can have no role in my daughter's life.

Thank You

/s/ M—— L——
M—— L——
14 W——
(314) ——-———

My Attorney

Mr. William Grant
11 South Meramec
Suite 1330
St. Louis, Mo 63105
(314) 721-6677

Guardian for Child as appointed by St. Louis City Court

Steven Cohen
9666 Olive Boulevard
Suite 300
P.O. Box 32414
St. Louis, Mo 63132

Michael Tully Special
Investigation Unit of
the Circuit Attorney's
Office.
1320 Market Street
St. Louis, Mo 63103
(314) 622-4941

Judge Dowd
Juvenile Courts
City of St. Louis
920 N. Vandeventer
St. Louis, MO 63108
(314) 531-3604

Facts on M—— N—— M——

Sex: Female 7 lbs 15 ounces

Born: July 30, 1987 at St Mary's Health Center Center in St. Louis, Missouri.

Mother's Name: L—— C—— M——
3829 —— ——
St. Louis, Mo 63110

ATTACHMENT 2

[State Seal]

TWENTY-SECOND JUDICIAL CIRCUIT
OF MISSOURI
JUVENILE DIVISION
920 North Vandeventer
St. Louis, Missouri 63108

Robert G. Dowd, Jr.
Presiding Judge

Area Code 314
531-3600

February 16, 1989

The Honorable Bruce S. Mencher
Presiding Judge
Family Division
Superior Court of the District of Columbia
Washington. D.C. 20001

Dear Judge Mencher:

In response to your letter of January 18, 1989, I enclose copies of pertinent pleadings from a Court file which is currently pending before me.

I have informed the attorneys for the parties that I am doing this and no one has objected. By agreement of the parties I have ordered that the proceedings be kept confidential.

There is currently no trial setting in this matter. I understand Plaintiff's attorney is or will take steps to file certain pleadings in your Court prior to proceeding on the case here in St. Louis.

I hope the enclosed is helpful. Please call or write if I can be of further service.

Sincerely,

/s/ Robert G. Dowd, Jr.
ROBERT G. DOWD, JR.
Presiding Judge
Juvenile Division

RGD:mh

ATTACHMENT 3

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
Washington, D.C. 20001

April 11, 1990

Warren R. King
Judge

Honorable Robert G. Dowd, Jr.
Presiding Judge
Juvenile Division
Twenty-Second Judicial Circuit of Missouri
920 North Vandeventer
St. Louis, Missouri 63108

RE: L—— *v.* M——, *et al*
883-00411

Dear Judge Dowd:

The case captioned above is one that was assigned to you in late 1988, and was the subject of correspondence between Judge Bruce Mencher of this court and you in early 1989.

I am the assigned judge in an adoption matter in this court involving some of the parties in the case before you. The plaintiff in your case—M—— L—— —claims to be the natural father of the child who is the subject of the adoption proceeding before me. He is seeking to intervene in that matter.

In the course of the proceedings here, I have received some documents dealing with efforts by you attempting to determine the physical location of the child in question. Specifically, I have received a copy of: (1) a November 23, 1988, letter to you from Michael G. Ravetta, Assistant Circuit Attorney for the City of St. Louis, and (2) a

January 17, 1989, letter to you from Mr. William P. Grant, apparently, the attorney for Mr. L——. Attached to the leter is a note, which I have been informed is in your handwriting, dated January 23, 1989. Copies of this correspondence are attached.

It would assist me in resolving this matter if you could provide me with some information concerning this correspondence. Specifically, I would like to know whether you shared the contents of Mr. Ravetta's November 23, 1988, letter with the parties, and if so, the exact information you provided and the date when you did so. Second, I would appreciate it if you could provide me with any information you have regarding the circumstances surrounding the note purported to have been written by you dated January 23, 1989, which is attached to Mr. Grant's January 17, 1989, letter to you.

I expect that the information that I am requesting here will be of great assistance in resolving some aspects of the case pending before me. I would greatly appreciate your assistance.
22

Sincerely yours,

/s/ Warren R. King
JUDGE WARREN R. KING

WRK:lmh

ATTACHMENT 4

GEORGE A. PEACH
Circuit Attorney
For the City of St. Louis

Municipal Courts Building
1320 Market Street, Room 130
St. Louis, Missouri 63103
(314) 622-4941

November 23, 1988

Confidential

Honorable Robert G. Dowd
Division 2
22nd Judicial Circuit
City of St. Louis
St. Louis, Missouri

In re: *M.J.L. v. L.C.M. and M.N.M.*
Cause No. 883-00411

Dear Sir:

In response to your order dated November 4, 1988 our investigation revealed the following: The child in question was turned over to Catholic Charities in Washington D.C. within 30 days of her birth. Adoption proceedings were recently finalized in D.C. We were unable to obtain further specifics re dates, court, etc. This investigation was initiated at the request of the Honorable John D. Chancellor to determine if any criminal violation occurred. We have found no evidence at this point that any criminal statutes have been violated and will take no further action. I hope this information will aid in the resolution of the issue in the above cause. If you have any further questions please call.

Yours truly,

/s/ Michael G. Ravetta
MICHAEL G. RAVETTA
Assistant Circuit Attorney

ATTACHMENT 5

[State Seal]

TWENTY-SECOND JUDICIAL CIRCUIT
OF MISSOURI
JUVENILE DIVISION
920 North Vandeventer
St. Louis, Missouri 63108

Robert G. Dowd, Jr.
Presiding Judge

Area Code 314
531-3600

April 20, 1990

The Honorable Warren R. King
Superior Court of the District of Columbia
Washington, DC 20001

Dear Judge King:

In response to your letter of April 11, 1990, the November 23, 1988 letter from Mr. Ravetta of the St. Louis Circuit Attorney's Office was shared with the parties and their attorneys on or about November 14, 1988 (with the admonition of confidentiality regarding said letter (see enclosures A and B). As to the copy of the note which I wrote attached to Mr. Grant's letter, that note was merely a reminder to myself as to the course of action that Mr. Grant expected to take in Court in Washington, D.C. It was inadvertently copied and sent to you unintentionally. You can ignore it.

Finally, pursuant to enclosures (C and D), I am requesting your Court to give full faith and credit to the Order for Blood Tests in order to resolve some issues pending before me.

I hope this information is helpful. Please let me know if you have other questions or requests for information.

Very truly yours,

/s/ Robert G. Dowd, Jr.
ROBERT G. DOWD, JR.

RGD/pm
Enclosures

DISTRICT OF COLUMBIA COURT OF APPEALS

A252-87

No. 90-FS-1395

IN THE MATTER OF: M.N.M., M. J. L.,
Appellant.

BEFORE: Rogers, Chief Judge; Ferren, Terry, Steadman, Schwelb, Farrell, Wagner, *King, and Sullivan, Associate Judges.

ORDER

[Filed July 9, 1992]

On consideration of the petition of appellees, Associated Catholic Charities of the Archdiocese of Washington, D.C., for rehearing en banc, and the opposition thereto; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

---

* Associate Judge King has recused himself from this case.

STATUTES INVOLVED

§ 16-304. Consent.

(a) A petition for adoption may not be granted by the court unless there is filed with the petition a written statement of consent, as provided by this section, signed and acknowledged before an officer authorized by law to take acknowledgments, before a representative of a licensed child-placing agency, or before the Mayor of the District, or unless a relinquishment of parental rights with respect to the prospective adoptee has been recorded and filed as provided by section 32-786 [32-1007].

(b) Consent to a proposed adoption of a person under eighteen years of age is necessary:

(1) from the prospective adoptee, if he is fourteen years of age or over; and also,

(2) in accordance with the provisions of any one of the following paragraphs:

(A) from both parents, if they are both alive; or

(B) from the living parent of the prospective adoptee, if one of the parents is dead; or

(C) from the court-appointed guardian of the prospective adoptee; or

(D) from a licensed child-placing agency or the Mayor in case the parental rights of the parent or parents have been terminated by a court of competent jurisdiction or by a release of parental rights to the Mayor or licensed child-placing agency, based upon consents obtained in accordance with paragraphs (A) through (C) of this subdivision, and the prospective adoptee has been lawfully placed under the care and custody of the agency or the Mayor; or

(E) from the Mayor in any situation not otherwise provided for by this subsection.

(c) Minority of a natural parent is not a bar to that parent's consent to adoption.

(d) When a parent whose consent is hereinbefore required, after such notice as the court directs, cannot be located, or has abandoned the prospective adoptee and voluntarily failed to contribute to his support for a period of at least six months next preceding the date of the filing of the petition, the consent of that parent is not required.

(e) The court may grant a petition for adoption without any of the consents specified in this section, when the court finds, after a hearing, that the consent or consents are withheld contrary to the best interest of the child.

(f) A person over eighteen years of age may be adopted, on the petition of the adopting parent or parents and with the consent of the prospective adoptee, if the court is satisfied that the adoption should be granted. (Dec. 23, 1963, 77 Stat. 538, Pub. L. 88-241, § 1; July 29, 1970, 84 Stat. 555, Pub. L. 91-358, title I, § 145(a)(2); Oct. 22, 1970, 84 Stat. 1086, Pub. L. 91-488; 1973 Ed., § 16-304; July 22, 1976, D.C. Law 1-75, § 5(e), 23 DCR 1182; Oct. 1, 1976, D.C. Law 1-87, § 12, 23 DCR 2544; Apr. 30, 1988, D.C. Law 7-104, § 4(b), 35 DCR 147.)

§ 16-306. Notice of adoption proceedings.

(a) Except as provided by subsection (b) of this section, due notice of pending adoption proceedings shall be given to each person whose consent is necessary thereto, immediately upon the filing of a petition. The notice shall be given by summons, by registered letter sent to the addressee only, or otherwise as ordered by the court.

(b) A party who formally gives his consent to the proposed adoption, as provided by this chapter, thereby waives the requirement of notice to him pursuant to this

section. (Dec. 23, 1963, 77 Stat. 539, Pub. L. 88-241, § 1; 1973 Ed., § 16-306.)

§ 16-310. Finality of decrees of adoption.

An attempt to invalidate a final decree of adoption by reason of a jurisdictional or procedural defect may not be received by any court of the District, unless regularly filed with the court within one year following the date the final decree became effective. (Dec. 23, 1963, 77 Stat. 540, Pub. L. 88-241, § 1; 1973 Ed., § 16-310.)

TABLE OF STATE STATUTES OF LIMITATIONS

STATE	POST-JUDGMENT LIMITATIONS PERIOD	STATUTE
Alabama	Five Years	Ala. Code § 26-10-5(c) (1986)
Alaska	One Year	Alaska Stat. § 25.23.140(c) (1991)
Arizona	Order of Adoption is Final Subject to Appeal	Ariz. Rev. Stat. Ann. § 8-116 (1989)
Arkansas	One Year	Ark. Code Ann. § 9-9-216(b) (Michie 1991)
California	Three Years (Procedural Defects) Five Years (Other Grounds)	Cal. Civ. Code § 228.15 (Deering 1990)
Colorado	Two Years	Colo. Rev. Stat. § 19-5-214 (1986)
Delaware	Two Years	Del. Code Ann. tit. 13, § 918 (1981)
Florida	One Year	Fla. Stat. Ann. § 63.182 (West 1965)
Hawaii	One Year	Haw. Rev. Stat. § 578-12 (1985)
Illinois	One Year	Ill. Ann. Stat. ch. 40, para. 1513 (Smith-Hurd 1980)
Kentucky	Two Years	Ky. Rev. Stat. Ann. § 199.540 (2) (Michie/Bobbs-Merrill 1991)
Louisiana	6 Months if Fraud or Duress, Otherwise Final on Date of Decree	La. Child Code Ann. art. 1263 (West 1992)
Maryland	One Year	Md. Code Ann., Fam. Law § 5-325 (1991)
Massachusetts	One Year	Mass. Ann. Laws ch. 210, § 11 (Law. Co-op. 1981)

STATE	POST-JUDGMENT LIMITATIONS PERIOD	STATUTE
Mississippi	Six Months	Miss. Code Ann. § 93-17-15 (1973)
Missouri	One Year	Mo. Ann. Stat. § 453.140 (Vernon 1986)
Montana	Adoption Is Final From Date of Decree	Mont. Code Ann. § 40-6-108(6) (1991)
Nebraska	Two Years	Neb. Rev. Stat. § 43-116 (1988)
Nevada	After Six Month Waiting Period, Final on Date of Decree	Nev. Rev. Stat. Ann. § 128.150(5) (Michie 1986)
New Hampshire	One Year	N.H. Rev. Stat. Ann. § 170-B:17 (II) (1990)
New Mexico	One Year	N.M. Stat. Ann. § 40-7-51(F) (Michie 1978)
North Dakota	One Year	N.D. Cent. Code § 14-15-15 (1991)
Ohio	One Year	Ohio Rev. Code Ann. § 3108.15(B) (Anderson 1989)
Oklahoma	One Year	Okla. Stat. Ann. tit. 10, § 58 (West 1987)
Oregon	One Year	Or. Rev. Stat. § 109.381(3) (1991)
Rhode Island	One Year	R.I. Gen. Laws § 15-7-21 (1988)
South Carolina	One Year	S.C. Code Ann. § 20-7-1800 (Law. Co-op. 1985)
Texas	Two Years	Tex. Fam. Code Ann. § 16.12 (West 1986)
Virginia	Six Months	Va. Code Ann. § 63.1-237 (Michie 1991)
Washington	One Year if Parent Executed a Written Consent	Wash. Rev. Code Ann. § 26.33.360(3) (West 1986)
West Virginia	One Year	W.Va. Code § 48-4-12(a) (1992)

[Excerpts from Brief of Appellant]

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 90-1395

IN RE: M.N.M.

BRIEF OF APPELLANT

Appeal from the Superior Court
of the District of Columbia
Family Division
(A-252-87)

/s/ Harvey Schweitzer
JAMES A. SHRYBMAN
HARVEY SCHWEITZER
EDITH R. BLACKWELL
Shrybman & Associates
801 Wayne Avenue, 4th Floor
Silver Spring, Maryland 20910
(301) 588-0040
Attorneys for Appellant, M.J.L.

* * * *

This Court has addressed a father's procedural and substantive rights at length in *In the Matter of Baby Boy C*, 581 A.2d 1141 (D.C. App. 1990).

Although factually different from this case, *Baby Boy C* stands for the proposition that the notice requirements of D.C. adoption law must be strictly adhered to and that the lack of prompt effective notice of the proceedings is fatal to an adoption decree.

B. *The D.C. Adoption Statute is Unconstitutional As Applied In This Case*

The D.C. adoption statute, as it was applied in this case, suffers from constitutional defects similar to those addressed in *Raquel Marie X*, 559 N.Y.S. 2d 855, 559 N.E. 2d 418 (1990). The D.C. adoption code does not enable fathers to assert their parental interest in their child unless they do so in response to an adoption petition. Therefore, fathers cannot challenge an adoption or assert their "opportunity interest" unless a petition is filed and the father receives prompt effective notice of the adoption.

D.C.'s adoption code suffers from two other constitutional defects.

First, the code allows an adoption to be granted without significant diligent efforts being made to locate or identify unknown or unlocatable birth fathers. Instead, as this case proves, a final decree can be granted with no notice or even a good faith attempt at notice.

Secondly, D.C. Code § 16-310 is constitutionally defective if it bars a challenge to a decree that violated the substantive due process rights of a father. § 16-310 could not pass constitutional muster if it could be used to insulate a decree ridden with defects which stripped a father of his constitutional right to parenthood. For example, if 310 prevented a fit parent, who had not abandoned his opportunity interest, from challenging a decree, that was void or procured by fraud, then it is unconstitutional.

This is what has happened here. The Father never abandoned his opportunity interest, never received notice of the adoption proceeding, yet was precluded from even becoming a party to the adoption.

* * * *

(2)

No. 92-600

Supreme Court, U.S.
FILED
NOV 9 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ADOPTIVE PARENTS OF M.N.M.,
Petitioners,

v.

M.J.L.,
Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

RESPONDENT'S BRIEF IN OPPOSITION

JAMES A. SHRYBMAN
HARVEY SCHWEITZER
SHRYBMAN & ASSOCIATES, P.C.
4th Floor
801 Wayne Avenue
Silver Spring, MD 20910
(301) 588-0040

CLIFTON S. ELGARTEN *
CROWELL & MORING
10th Floor
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2523
Attorneys for Respondent, M.J.L.

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Should a father be allowed to intervene in the adoption of his child when he attempts to intervene prior to expiration of the statute of limitations, and when, in violation of law, no attempt whatsoever was made to notify him of the adoption proceedings?

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT	1
REASONS FOR DENYING THE WRIT	4
THIS CASE IS NOT WORTHY OF SUPREME COURT REVIEW	4
A. No New Rights for Fathers Have Been Created	4
B. There Is No Conflict in the Case Law	7
CONCLUSION	9

TABLE OF AUTHORITIES

CASES — Page

In Re Adoption of Knipper, 30 Ohio App. 3d 214, 507 N.E. 2d 436 (1986) 8
In Re Wildeboer, 406 So. 2d 687 (La. App. 1981) 8
In the Matter of Adoption of Lori Gay W., 589 P.2d 217 (Okla. 1978), *cert. denied*, 441 U.S. 945 (1979) 7
Kidder v. Hess, 481 So. 2d 984 (Fla. App. 1986) 8
Lehr v. Robertson, 463 U.S. 248 (1983) 4, 6, 7, 9
Olney v. Gordon, 402 S.W. 2d 651 (Ark. 1966) 8
Summers v. Mylan, 697 S.W. 2d 91 (Ark. 1985) 8
Sumter v. Allton, 648 S.W. 2d 55 (Ark. 1983) 8
Syrovatka v. Erlich, 608 F.2d 307 (8th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980) 7
Wade v. Geren, 743 P.2d 1070 (Okla. 1987) 8
Walter v. August, 186 Cal. App. 2d 395, 8 Cal. Rptr. 778 (1960) 7
White v. Davis, 163 Colo. 122, 428 P.2d 909 (1967) 8

STATUTES

D.C. Code Ann.
§ 16-304(b)(2)(A) 2
§ 16-304(d) 6, 8
§ 16-306(a) 2, 8
§ 16-309(b)(3) 6
§ 16-310 ..... 1, 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-600

ADOPTIVE PARENTS OF M.N.M.,
Petitioners,

v.

M.J.L.,
Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT

The decision under review does not question generally the constitutionality of District of Columbia adoption laws or the one year statute of limitations which it contains. Rather, the challenged statute of limitations was found unconstitutional as appiled to the specific circumstances of this case. D.C. Code Ann. § 16-310 (Petitioner's Appendix 50a).

Petitioners seriously misstate the meaning and reach of the decision, which is quite narrow and limited to the unique facts of the case. Moreover, in affording a father a right to be heard in connection with the adoption of his child, the court below has not disturbed the underlying adoption.

This case involves a man, M.J.L., who, since the birth of his child—indeed, even before, from the time he learned of the pregnancy—has strenuously endeavored to assert his parental rights.

Before the birth of his child, he went to adoption agency counseling sessions in St. Louis with the birth mother, and expressed his desire to parent the child and his objection to an adoption. He alerted the hospital of his desire to parent the child and requested that he be notified of the child's birth. After the child was born, he filed paternity and custody actions in St. Louis. While that suit was pending, the mother, along with a District of Columbia adoption agency, initiated adoption proceedings in the District of Columbia.

District of Columbia law requires that "consent to a proposed adoption . . . is necessary . . . from both parents, if they are both alive . . .". D.C. Code Ann § 16-304(b)(2)(A), (Pet App. 48a) and that "due notice of pending adoption proceedings shall be given each person whose consent is necessary thereto, immediately upon filing a petition." D.C. Code Ann. § 16-306(a). (*Id.*)

Notwithstanding that the mother was obviously well aware of respondent's interest, he was not given notice. Pet. App. 14a-15a. Neither was there any legitimate reason for failing to give him notice. *Id.* The reasons asserted by the mother "for concealing the proceedings from appellant" were examined by the court below and found woefully inadequate. Pet. App. 15a. Thus, this is a case in which—despite the statutory and constitutional principle that a father is entitled to notice and a right to be heard before he may be stripped of his legal ties to his child—there were "conceded efforts" by "the mother and her parents, acquiesced in by the adoption agency to keep [respondent] in the dark." Pet. App. 13a.[1]

---

[1] The record does not reveal whether the adopting parents had any complicity in these efforts to deprive respondent of the notice which was due him.

Upon learning of an adoption proceeding in the District of Columbia, respondent wrote to the court and asked to intervene. His request took a long time to reach the proper judge. He persisted in his efforts, and one year and forty-five days after the decree, finally succeeded in filing a formal motion to intervene.

Petitioner argued successfully to the trial court that the one year statute of limitations within which to challenge a final decree of adoption barred respondent from being heard. The trial court reasoned—and petitioners insist—that notwithstanding the deception practiced on the respondent, his submissions to the court within the one year period were not "regularly filed with the court" within the meaning of D.C. Code Ann. § 16-310. Although his continuous contacts included a submission that was "regularly filed," it came after the one year period. Therefore, respondent would not be given any opportunity to be heard.

The District of Columbia Court of Appeals reversed. It held simply that in no sense had respondent abandoned the child. His continued and repeatedly expressed interest required that he was entitled to have received the *statutory notice* which the law provides to him. Specifically, the court held that he had clearly grasped his opportunity and accepted "some measure of responsibility for the child's future," and thus could not be ignored when fundamental decisions, which would terminate his parental rights, were made by the courts. Pet. App. 10a-11a. Since he had a constitutional right to notice, the deception practiced upon him—indeed the plain "failure to notify [respondent] in disregard of the statute [and without excuse] would appear, without more, to violate his right to due process." Pet. App. 16a.

The court below held only that the respondent had a right to present his case. It did not reach the question as to how respondent's rights would affect the ultimate

disposition of the adoption proceedings—a proceeding which will focus on the best interest of the child:

> . . . many factors must be evaluated in deciding what disposition is best for this child, including the fact that [she] has lived with the adoptive parents for more than four years. We hold only that, assuming paternity, [respondent] must be accorded the opportunity to voice 'his opinion of where the child's best interest lie'. Citing *Lehr v. Robertson*, 463 U.S. 248, 262 (1983). Pet. App. 19a.

Contrary to the contentions of the petitioners, the court of appeals did not conclude that statutes of limitations are repugnant to the Constitution, nor did it extend the reach of *Lehr v. Robertson*, 463 U.S. 248 (1983), nor did it in any way rule that adoptions could never become final. Instead, the court of appeals granted limited relief to a father whose statutory right to notice of an adoption had been clearly and purposefully violated.

REASONS FOR DENYING THE WRIT

THIS CASE IS NOT WORTHY OF SUPREME COURT REVIEW

A. No New Rights for Fathers Have Been Created

Petitioners' hyperbole distorts the case under review. This case is an application of established legal principles to unique facts. The decision does not discuss the substantive rights of fathers, but merely reaffirms the modest procedural protections that must be afforded a man who zealously seeks to parent his child.

The petitioners admit, and the court of appeals ruled, that the notice provisions of the adoption statute had been clearly violated. The thrust of the court of appeals' opinion was that such purposeful violation of the statute—at least as respects a father that has actively pursued his interest in his child, and was thus entitled to constitutional protection—could not be tolerated. Any other

ruling would have meant that adoption agencies would be entitled to ignore statutory notice provisions—notice provisions that are constitutionally required—and thus reward misconduct and fraud.

The unsupported self-serving assertion by petitioners that "thousands" of adoptions will be affected by this decision (Pet. 4) totally misses the thrust of the holding. So long as adoption agencies and parents wishing to allow a child to be adopted are respectful of the interests of the other parent—where that parent has in turn shown an interest in the child—no adoptions will be overturned. To assume, as petitioners assume, that there are thousands of adoptions that will be affected is to assume that parents, agencies, and courts have been allowing the practices of concealment evidenced here. Even then, nothing in this case suggests that long-standing adoptions will be overturned, if such overturning is not in the child's best interest.

This was a case where respondent acted quickly to assert his interests. D.C. law was violated in circumstances which completely deprived a father of his opportunity to participate in the adoption of his child. Moreover, these circumstances included a mother who refused to disclose the father's identity, and an adoption agency which merely asserted, without more, that it was unable to locate or identify the father. The court of appeals properly rejected this as a basis for ignoring the clear requirements of District law:

> [Petitioners] do not contend that the adoption agency attempted to notify [the respondent] of the pending proceedings or that the trial court directed notice to him of the proceedings (or found that such notice would be futile). [Footnote omitted]. [Petitioners] also do not assert this to be a case in which fears about the safety of the child or other persons justified concealing the proposed adoption from the father. This court has not had occasion to decide whether extra-statutory concerns such as these might justify

> refusal to give a natural parent notice; we assume for present purposes that they may. But in view of the fundamental right at stake of a parent who has grasped his opportunity interest, [*Lehr v. Robertson*, 463 U.S. at 261], such concerns would surely have to be exceptional before an adoption could be approved without the parent having been contacted or given the opportunity to be heard on the matter. The reasons the mother gave here—and the adoption agency accepted—for concealing the proceedings from [respondent] fall well short of this exceptional showing; we do not understand [petitioners] to argue otherwise. Pet. App. at 14a-15a [Footnote omitted].

The court below was careful to affirm that there are circumstances where the failure to give notice would be excusable. This was not one of them. The D.C. Code clearly spells out how to proceed when a father (or mother) is unknown or unlocatable (D.C. Code Ann. § 304(d), (Pet. App. 49a)). These procedures were not followed. Although petitioners imply that the decision under review prevents adoptions from ever becoming final, this is far from the truth. The decision reveals that finality is a product of proper adherence to simple statutory directives.[2]

Allowing the trial court decision to stand, and thus forever preventing M.J.L. from voicing his opinion, does nothing to advance the legitimate purposes of D.C. adoption law, especially those provisions requiring notice. Indeed, the opposite is true. Only by enforcing those notice provisions is ordinary respect for law—and due process—assured.

---

[2] The petitioners imply that the decision is contrary to the adoptive child's interests. However, the child's best interests were not before the court of appeals which stated:

> We express no opinion on the ultimate issue of whether the adoption entered by the trial court is in the best interests of the child. D.C. Code § 16-309(b)(3). (Pet. App. 2a)

B. There Is No Conflict in the Case Law

Petitioners cite five cases in an effort to prove that courts are rendering conflicting opinions on the issue presented. The five cases prove that there is no conflict. The five cases are from different states, and each represents a different set of facts applied to a different statute. These five cases are not so much concerned with the constitutionality of statutes of limitations, but with the enforcement of state adoption laws, especially those provisions addressing notice to parents.

Two of the five cases barred challenges to a final decree of adoption. In one case, *Syrovatka v. Erlich*, 608 F.2d 307 (8th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980), the parents knew about the relevant proceeding, knew about the adoption, and did not allege violations of statutory notice provisions. In any event, *after learning of the adoption*, the parents let 3 years go by before they challenged the adoption.

Walter v. August, 186 Cal. App. 2d 395; 8 Cal Rptr. 778 (1960) enforced a statute of limitations against parents who were clearly disinterested in the child and who waited over 5 years to challenge the adoption. But even *Walter* allowed that:

> It might be possible to imagine a case which could be of such character that a court would feel compelled to construe [a statute of limitation] as admitting of some exception . . . . *Id.* at 781. Citations omitted.

In any event, these two cases *preceded* this Court's decision in *Lehr* in which the due process interest of a father in his child was affirmed.

The three remaining cases are—as petitioners concede—fully consistent with the decision of the court below. In *In the Matter of Adoption of Lori Gay W.*, 589 P.2d 217 (Okla.), *cert. denied*, 441 U.S. 945 (1979), the court held that a statute of limitations could present a bar—but only if the statute was tolled until the parent learned of the entry of the adoption order. Pet. 18. The remain-

ing two cases, as petitioners concede, were cases in which final adoptions were disturbed. These two cases involved parents who were *not* provided with timely notice, *and* the lack of such timely notice was found to violate the adoption statute. *White v. Davis*, 163 Colo. 122, 428 P.2d 909 (1967); *In Re Adoption of Knipper*, 30 Ohio App. 3d 214, 507 N.E. 2d 436 (Ohio App. 1986).

These five cases display consistency not conflict. When parents know of an adoption and do nothing, they are not permitted to upset the adoption. When *notice* is improperly denied to a parent, relief is granted, notwithstanding any statute of limitations. It is hard to imagine, in any event, how three decisions, one in 1967, one in 1986, and one in 1992 can be described as a "trend". Pet. 19. These three cases stand for the proposition that state courts will not tolerate failure to provide required notice to parents.

Other decisions, not cited by petitioners, similarly demonstrate careful and consistent respect for the rights of a parent when a party fails to disclose critical information and such failure results in a denial of statutorily required notice. *Wade v. Geren*, 743 P.2d 1070 (Okla. 1987); *In Re Wildeboer*, 406 So. 2d 687 (La. App. 1981); *Summers v. Mylan*, 697 S.W. 2d 91 (Ark. 1985); *Kidder v. Hess*, 481 So. 2d 984 (Fla. App. 1986); *Sumter v. Allton*, 648 S.W. 2d 55 (Ark. 1983) (adoption decree set aside because father deprived of notice; fraud tolls statute of limitations); *Olney v. Gordon*, 402 S.W. 2d 651 (Ark. 1966).

Finally, petitioners also argue that the situation under review will continue to occur because mothers frequently refuse or are unable to provide the identity of the father. This is incorrect. The District of Columbia adoption code already provides for situations in which it can be proven that notice is impossible because a father is unknown or unlocatable. (D.C. Code Ann. § 16-304(d); 306(a)) Pet. App. 49a. As the court of appeals noted, these provisions were not utilized in this case.

The real argument that petitioners make is that all final decrees must forever be insulated from challenge, regardless of the facts and regardless of adherence to state law. This absolutist position has been consistently and properly rejected by state courts and the D.C. Court of Appeals. Given that fathers have rights too, *Lehr v. Robertson*, 463 U.S. 248 (1983), the purposeful failure to give notice to a father who has demonstrated his interest in the welfare of the child cannot be so easily ignored.

Cases involving adoption often involve strong emotions and difficult decisions. As will happen in this case, the ultimate resolution will reflect the unique facts of the case. Here, the issue of notice also involves unique facts. The result is not, in any sense, revolutionary. The court below applied clear precedent of this Court to those facts.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JAMES A. SHRYBMAN
HARVEY SCHWEITZER
SHRYBMAN & ASSOCIATES, P.C.
4th Floor
801 Wayne Avenue
Silver Spring, MD 20910
(301) 588-0040

CLIFTON S. ELGARTEN *
CROWELL & MORING
10th Floor
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2523

Attorneys for Respondent, M.J.L.

* Counsel of Record

MOTION FILED
NOV 9 1992

No. 92-600

In The

Supreme Court of the United States

October Term, 1992

Adoptive Parents of M.N.M.,

Petitioners,

v.

M.J.L.,

Respondent.

On Petition For Writ Of Certiorari
To The District Of Columbia Court Of Appeals

MOTION OF THE NATIONAL COUNCIL FOR ADOPTION AND THE CHILD WELFARE LEAGUE OF AMERICA FOR LEAVE TO FILE BRIEF AND BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

E. Calvin Golumbic*
Sharon M. Schroer
Arent, Fox, Kintner, Plotkin
& Kahn
1050 Connecticut Avenue N.W.
Washington, D.C. 20036
(202) 857-6000

Attorneys for Amici Curiae the National Council For Adoption and the Child Welfare League of America

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION OF THE NATIONAL COUNCIL FOR ADOPTION AND THE CHILD WELFARE LEAGUE OF AMERICA FOR LEAVE TO FILE A BRIEF AMICI CURIAE

The National Council For Adoption ("NCFA") and the Child Welfare League of American ("CWLA") respectfully move, pursuant to Supreme Court Rule 21, for leave to file the attached brief as *amici curiae* in support of the petition for a writ of certiorari. In support of this motion, the NCFA and the CWLA state the following:

Counsel for all parties have been asked to give permission for the filing of this brief in support of petitioners. William F. Hanrahan, counsel for petitioners, consented on their behalf. Harvey Schweitzer, counsel for respondent, declined to consent on his behalf.

The interest of the NCFA in this case arises from the fact that it is a national, voluntary organization concerned with issues affecting adoption. Its fundamental objective is to promote adoption, as a positive option for young, single or troubled parents, by encouraging sound adoption policies and practices. NCFA's membership includes private adoption agencies, adoptive parents, persons who were adopted, biological parents of children adopted by others and interested professionals.

Similarly, CWLA, a federation of 680 child welfare agencies, has long been involved in the development of quality programs and practice in the field of child welfare, including foster care and adoption. CWLA member agencies, located across the United States and Canada, provide comprehensive, quality adoption services to the

child, the birth parent(s) and the adoptive parents. CWLA is committed to adoption as a service for children who need permanent, nurturing and loving homes and long has supported policy, programs and practice that ensure that the best interest of the child is served through adoption.

NCFA and CWLA are particularly concerned about legal developments – legislative or judicial – that affect the timing of adoptive placements of young children or the finality of such placements, once made. Resolution of the issues in this case may seriously affect the law in these areas. In representing these particular interests, NCFA and CWLA advance arguments not presented by petitioners. In addition, NCFA's and CWLA's brief brings to the attention of the Court a recent decision rendered by the Court of Appeals of New York after the petition was filed in a case presenting substantially similar issues to those presented here. NCFA and CWLA believe that their views, reflecting the perspective of adoptive parents,

agencies providing adoption services, and child welfare agencies would be of assistance to the Court.

Respectfully submitted,

E. Calvin Golumbic*
Sharon M. Schroer
Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Avenue N.W.
Washington, D.C. 20036
(202) 857-6000

Attorneys for Amici Curiae the National Council For Adoption and the Child Welfare League of America

* Counsel of Record

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 4

SUMMARY OF THE REASONS FOR GRANTING THE PETITION 8

REASONS FOR GRANTING THE PETITION 9

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

In the Matter of Robert O. v. Russell K., No. 191, 1992 N.Y. Lexis 3478 (N.Y. Oct. 27, 1992).....13, 14

Lehr v. Robertson, 463 U.S. 248 (1983).....10, 11, 13

Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977).....10

Stanley v. Illinois, 405 U.S. 645 (1972).....11

Wells v. Children's Aid Society, 681 P.2d 199 (Utah 1984).....10, 11

STATUTES

D.C. Code Ann. § 16-310 ..... *passim*

District of Columbia Adoption Procedure, 68 Stat. 240 (1954).....11

OTHER MATERIALS

Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson*, 45 Ohio St. L.J. 313 (1984).....10

Goldstein, Freud, and Solnit, *Beyond the Best Interests of the Child* (The Free Press, 1979) 9

Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy – Balancing the Individual and Social Interests*, 81 Mich. L. Rev. 463 (1983) 10

No. 92-600

In The

Supreme Court of the United States

October Term, 1992

Adoptive Parents of M.N.M.,

Petitioners,

v.

M.J.L.,

Respondent.

On Petition For Writ Of Certiorari
To The District Of Columbia Court Of Appeals

BRIEF AMICI CURIAE OF THE NATIONAL COUNCIL FOR ADOPTION AND THE CHILD WELFARE LEAGUE OF AMERICA IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

Amici curiae are the National Council For Adoption ("NCFA") and the Child Welfare League of America ("CWLA"). NCFA is a nationwide charitable organization, formed in 1980 and headquartered in Washington, D.C. NCFA's fundamental objective is to promote adoption, as a positive option for young, single or troubled parents, by encouraging sound adoption policies and practices. NCFA's members include numerous private adoption agencies and individuals interested in adoption from nearly every state in the country. Those individuals

include adoptive parents, persons who were adopted, biological parents of children adopted by others, and interested professionals.

NCFA monitors legal developments in the adoption field, is involved, through sponsorship of the Council on Accreditation, in the accreditation of adoption agencies and other service providers, gathers and disseminates statistical and practical information and assists individuals and agencies with information concerning pregnancy, out-of-wedlock births, infertility, and other matters related to adoption. NCFA does not purport to advance the interests of only biological mothers or fathers, adopted children, or adoptive parents. Rather, NCFA advocates a balanced, informed and fair consideration of the competing rights and interests of all concerned.

CWLA is a federation of 680 child welfare agencies in the public and voluntary sectors. CWLA is almost three-quarters of a century old and has long been involved in the development of quality programs and practice in the field of child welfare, including foster care and adoption. A substantial number of CWLA member agencies, located across the United States and Canada, provide comprehensive, quality adoption services to members of the adoption triad – the child, the birth parent(s) and the adoptive parents. CWLA is committed to adoption as a service for children who need permanent, nurturing and loving homes and long has supported policy, programs and practice that ensure that the best interest of the child is served through adoption.

The need for finality in the adoption process is a fundamental concern of NCFA and CWLA. That need is served by the one-year statute of limitations embodied in D.C. Code § 16-310 (1989), which appropriately balances the interests of the adoption triad – the child, the birth parents and the adoptive parents. Thirty-one other states have adopted similar limitations periods for the same reason – to protect the finality of adoption decrees.

The Court of Appeals has created a significant and drastic exception to such statutes of limitations. In addition, the Court's decision, in effect, imposes a substantial, and, in some cases, insurmountable burden on adoption agencies to search out and notify putative fathers of adoption petitions in cases where the biological mother either declines or is unable to identify the father or his whereabouts.

As a result, this decision has severe consequences for the adoption process, the adoptive family and the biological mother. The decision places a child in ongoing jeopardy of family disruption based on the wishes of adults who have failed to exercise their rights within a reasonable period of time. Moreover, the right of an adoptive family to nurture and enjoy a new child, and that of the child to be nurtured, without the threat of unreasonable interference, has been shattered. Families that have survived the traumatic period between entry of the adoption decree and the expiration of a statute of limitations must now fear that a putative father whose identity and activities were completely unknown to them may now tear asunder their family unit that has bonded for many many months and even years.

In addition, the decision will inevitably deter relinquishment of out-of-wedlock infants for whom adoption may be the best alternative. It will also delay adoptive placement, pending extraordinary efforts to identify biological fathers who frequently have no desire to be identified, to the detriment of a critical bonding period. And it will discourage adoptive parents from coming forward to participate in the process. The decision could mean that in many cases children, who would otherwise be expeditiously adopted, may be subjected to indefinite periods of inappropriate, detrimental and expensive foster care. This is contrary to the interest of NCFA and CWLA, the families and children they serve, and the Nation itself.

M.N.M. has now been part of her family – her mother, her father and her older brother who was also adopted – for five years. The psychological harm to M.N.M., her parents and her brother from this decision is beyond dispute. Without a reversal or clarification from this Court, the traumatic effects of this decision on the institution of the family may be repeated across the country.

STATEMENT OF THE CASE

The female child, M.N.M., who is the subject of this adoption proceeding was born on July 30, 1987, in St. Louis, Missouri. She was placed with an adoptive family in Washington, D.C., over five years ago on August 20, 1987. Her adoptive parents filed a petition for adoption on November 5, 1987. On April 11, 1988, the Superior Court of the District of Columbia entered a final adoption decree. The statutory

period for filing a challenge to the decree expired one year later on April 11, 1989. Pet. App. 2a-3a.[1]

M.N.M.'s biological mother, L.C.M., consented to the adoption. However, because she would not disclose the name of the biological father, he was not given prior formal notice of the adoption proceeding, and his prior consent was not obtained. Pet. App. 3a-4a. On June 5, 1988, almost two months after the statute of limitations expired, M.J.L., who claims to be the biological father of M.N.M., filed a motion in the adoption proceeding in the Superior Court alleging that his statutory and constitutional rights had been violated. Pet. App. 6a.

L.C.M. and M.J.L. had a relationship while they were seniors in high school in St. Louis, Missouri. During her senior year, L.C.M. became pregnant. She decided to have the child and to place it for adoption. In early June of 1987, she sought adoption counseling with St. Louis Catholic Charities. St. Louis Catholic Charities contacted M.J.L. and his parents to advise them of the possible adoption. M.J.L. objected and expressed a desire to raise the child himself. M.J.L. also contacted the hospital where he expected L.C.M. to give birth and requested that he be notified of the birth. Although L.C.M. did give birth at that hospital shortly thereafter, the hospital did not notify M.J.L. of the birth. Pet. App. 2a-3a, 4a, n.4.

L.C.M. did not agree with M.J.L.'s request to raise the child himself. Instead, within a couple days of the birth,

---

[1] The references to "Pet. App." are to the Appendix to the Petition for a Writ of Certiorari.

L.C.M. and her father travelled with M.N.M. to Washington, D.C., where M.N.M. was placed for adoption through Associated Catholic Charities of the Archdiocese of Washington, Inc. ("Catholic Charities"). M.N.M. was placed by Catholic Charities in a preadoptive home on August 4, 1987. L.C.M. signed an affidavit that she did not know the whereabouts of the biological father. M.N.M. was placed with her adoptive family on August 20, 1987. Pet. App. 3a. She has remained with that family for more than five years.

On August 6, 1987, shortly before M.N.M. was placed with her adoptive family, M.J.L. filed a paternity and custody action in St. Louis County, Missouri. That action was subsequently dismissed for lack of jurisdiction and failure to prosecute. M.J.L. refiled the action five months later, in January 1988, in St. Louis City. Thereafter, M.J.L. deposed L.C.M. and her father. Apparently, however, they did not disclose the whereabouts of the child. Nevertheless, in late October 1988, the St. Louis court was advised by the St. Louis County Attorney's Office that there was an adoption proceeding pending in the District of Columbia. Pet. App. 3a-4a.

In early December 1988, four months before the expiration of the statute of limitations in the District of Columbia, M.J.L.'s attorney was advised by the St. Louis court of the adoption proceeding in the District of Columbia. M.J.L. sent a letter, in early January 1989, to a majority of the judges on the Superior Court of the District of Columbia, advising them of his circumstances and requesting that he be notified of any adoption proceedings concerning M.N.M. Pet. App. 4a-5a.

In mid-January, the presiding judge of the family division of the Superior Court of the District of Columbia, Judge Mencher, wrote to the St. Louis judge presiding over M.J.L.'s custody proceeding, Judge Dowd, requesting the pleadings and depositions in that case. On January 23, 1989, M.J.L.'s attorney in St. Louis advised the St. Louis court that M.J.L. intended to file a motion to intervene in the adoption proceeding in the District of Columbia. Pet. App. 5a, 7a.

On June 5, 1989, almost two months after the statute of limitations had expired, M.J.L. filed a motion to intervene in the adoption proceeding, alleging fraud, lack of notice and violation of his constitutional rights. The motion to intervene was denied because the Superior Court found that M.J.L.'s motion was untimely under the one-year statute of limitations of D.C. Code Ann. § 16-310. Pet. App. 6a-8a.

M.J.L. appealed to the District of Columbia Court of Appeals, arguing that Section 16-310, as applied to him, violated his right to Due Process under the Fifth Amendment to the United States Constitution. Pet. App. 54a. The Court of Appeals, with one judge dissenting, agreed and reversed. The Court, at the outset, rejected M.J.L.'s argument that his correspondence with the judges of the Superior Court in January 1989, and thereafter, constituted a pleading "regularly filed" with the Superior Court as required by Section 16-310. Pet. App. 9a. However, the Court then found that M.J.L. had perfected his interest in his parental relationship by his conduct, and, therefore, must be afforded due process. And the Court concluded

that the failure to notify M.J.L. of the filing of the adoption petition deprived him of due process. That deprivation was not, in the Court's view, subsequently remedied when M.J.L. was notified of the proceeding in December 1988, four months before the statute of limitations expired. Pet. App. 16a-19a.

SUMMARY OF THE REASONS FOR GRANTING THE PETITION

The District of Columbia statute of limitations for adoptions, D.C. Code Ann. § 16-310, imposing a one year limit on challenges to a final decree of adoption, reflects the strong public policy favoring the finality of adoptions. The statute properly balances the interests of the state, the adoptive parents and the child in finality with the rights of unwed putative fathers to participate in the adoption proceeding. The statute reflects the legislature's determination of a reasonable amount of time for a putative father, with diligence and good faith, to take whatever measures are necessary to protect his rights.

By striking down the District of Columbia adoption statute of limitations as applied to a putative father who did not receive formal notice of the adoption proceeding, the Court of Apepals has created a substantial and drastic exception to finality, leaving open the possibility that a new family unit can be disrupted at any time. The decision has drastic consequences for the adoption process and is not warranted under the Due Process Clause of the Constitution.

REASONS FOR GRANTING THE PETITION

The Court of Appeals has struck down the District of Columbia adoption statute of limitations, as applied to a putative father, M.J.L., who failed to intervene in the adoption proceeding until after the statute had expired. Although, the putative father had expressed his desire to raise the child when he first learned of the biological mother's intention to place the child for adoption, the mother, L.C.M., who consented to the adoption, did not disclose the whereabouts of the putative father prior to entry of the adoption decree. Accordingly, the adoption court was unable to personally notify the putative father prior to the entry of the adoption decree. In the face of this record, the Court of Appeals held that the Due Process Clause of the Constitution, as applied to the putative father, was violated and that the statute of limitations did not apply to him. The Court of Appeals' decision, by removing the rule of finality from a significant percentage of adoptions, unnecessarily burdens and complicates the adoption process.

Finality is critical to the child and the adoptive parents. The child's need to bond and to form attachments is immediate and crucial to normal development and emotional well-being. Indeed, the terrible and lasting psychological injury to the child caused by interrupting a loving parent-child relationship is well documented. *See* Goldstein, Freud, and Solnit, *Beyond the Best Interests of the Child,* (The Free Press, 1979) at 31-52. As one scholar has noted:

> [T]hose concerned about the welfare of an illegitimate infant cannot keep the child indefinitely in limbo, waiting to see what "functional

> equivalents" of marriage the father will demonstrate if he is given plenty of time. It is not difficult to sense the risks to a child in such circumstances, knowing as we do how much every child needs a sense of continuity and stability in the child-parent relationship.

Hafen, *The Constitutional Status of Marriage, Kinship and Sexual Privacy – Balancing the Individual and Social Interests*, 81 Mich. L. Rev. 463, 498-99 (1983). *See also* Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson*, 45 Ohio St. L.J. 313, 364 (1984) (A child's "need for early assurance of permanence and stability is an essential factor in the constitutional determination of whether to protect a parent's relationship with his or her child.").

The adoptive parents also have a strong interest in the finality of the adoption. They assume the burden of developing an interdependent family relationship with an adopted child and have a significant interest in continuing the relationship. *See Lehr v. Robertson*, 463 U.S. 248, 263-266, 266 n. 25 (1983); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 834-47 and n. 51 (1977). *See also Wells v. Children's Aid Society*, 681 P.2d 199, 203 (Utah 1984). The Wells court accurately observed:

> If infants are to be spared the injury and pain of being torn from parents with whom they have begun the process of bonding and if prospective parents are to rely on the process in making themselves available for adoptions, such determinations [of whom will assume the parental role] must also be final and irrevocable.

Id. at 206-07.

Moreover, if the interests of the adoptive parents are not recognized by a statutory finality through the adoptive process, it will deter other prospective parents from participating in that process. *Id.* Indeed, it was for that reason, among others, that Congress enacted a finality provision to the adoption process in the District of Columbia and declared that, among its purposes, was the " . . . socially necessary and desirable protection . . . of . . . the adopting parents . . . [by] protecting them from subsequent disturbance of their relationships with the child by natural parents." 68 Stat. 240, 241 (1954).

Of course, the need for finality, and the interests of the adopted child and the adoptive parents, must be reconciled with the rights of unwed biological fathers to participate in the adoption process. That right was first recognized under the Due Process Clause of the Constitution in 1972. *Stanley v. Illinois,* 405 U.S. 645 (1972). However, it was subsequently held that a biological relationship, standing alone, does not automatically merit due process protection. *Lehr v. Robertson,* 463 U.S. at 262. Instead, the Constitution imposes a burden on a putative father to demonstrate by affirmative acts that he has seized the opportunity to develop a relationship with his child in order to merit due process protection. *Id.* Nothing in the Constitution prohibits a legislature from requiring a putative father to make that demonstration within a specified period of time.

The statute of limitations here, which imposes finality on an adoption decree only after it has been in effect for one year, embodies the legislature's effort to balance and safeguard the rights of all interested parties in an

adoption. On the one hand, the adoptive parents and the adopted child are assured that the period of uncertainty for their newly formed family is limited to one year. On the other hand, a putative father has an opportunity to assert whatever rights he may possess, provided he does so within that statutory period. Thus, none of the rights of the parties to the adoptive process are unrecognized in the District of Columbia adoption statute, and the parties may assert their rights within the one-year limitations period.

The Court of Appeals struck down the District of Columbia statute of limitations without citing any authority for the proposition that a Constitutional claim cannot be forfeited if not timely raised. In striking down the statute, the Court expressly held that there was no "equitable tolling" principle that suspended application of the statute of limitations. Nor, indeed, did Congress, in enacting the statute, expressly recognize any exception to the finality rule for putative fathers with statutory or Constitutional claims. Nevertheless, the Court concluded that in circumstances where the putative father's identity has not been disclosed by the birth mother, and, therefore, the putative father did not receive formal notice of the filing of the adoption proceeding, the statute of limitations did not apply.

Certainly, M.J.L.'s efforts to be heard on the adoption of M.N.M., at first glance, garner sympathy and perhaps even admiration. Yet, we do not believe that whatever interests he may have in opposing the adoption of M.N.M., on balance, outweigh the interests of M.N.M. and her adoptive parents in continuing a family relationship that is now more than five years old. Indeed, we do

not believe, for the reasons already asserted, that the rights of the putative father survived after one year from the entry of the adoption decree. And we do not believe that this one-year limitation, as applied in this case, suffers from any Constitutional infirmities.

In sum, the State has a legitimate interest in promoting an adoption process that addresses the child's need for stability and ensures the participation of biological and adoptive parents. The importance of this societal interest was recently underscored by the New York Court of Appeals which resolved a similar controversy by declining to permit a biological father to intervene in an adoption proceeding after the adoption had become final. *In the Matter of Robert O. v. Russell K.*, No. 191, 1992 N.Y. Lexis 3478 (N.Y. Oct. 27, 1992).[2] As the New York court stated:

> States have a legitimate concern for prompt and certain adoption procedures and their determination of the rights of unwed fathers need not be blind to the "vital importance" of creating adoption procedures possessed of "promptness and finality," promoting the best interests of the child, and protecting the rights of interested third parties like adoptive parents (*Lehr v. Robertson*, [463 U.S. 248, 263-66, n. 25]). . . . To conclude that petitioner acted promptly once he became aware of the child is to fundamentally misconstrue whose timetable is

---

[2] In *Robert O.*, the biological mother became pregnant, gave birth and placed the child for adoption, all without informing the biological father who was not entitled to notice under the New York adoption statutes. The couple subsequently married and only then did the mother tell her husband of the birth and adoption. The father promptly sought to set aside the adoption decree, which had become final ten months earlier.

> relevant. Promptness is measured in terms of the baby's life not by the onset of the father's awareness. The demand for prompt action by the father at the child's birth is neither arbitrary nor punitive, but instead a logical and necessary outgrowth of the State's legitimate interest in the child's need for early permanence and stability. . . .

Robert O., 1992 N.Y. Lexis 3478 at 11-12.

The District of Columbia's statute of limitations embodies the legislature's judgment in balancing the competing interest of the child, the adoptive parents, and the biological parents. The statutory one-year period, which does not commence until after the final adoption decree is entered, is the legislature's determination of a reasonable amount of time for the putative father, with diligence and good faith, to take whatever measures are necessary to protect his rights.

The Court of Appeals' decision which, in effect, permits unwed putative fathers to override the interests of all other parties in finality whenever the fathers' identities are not disclosed prior to entry of the adoption decree will have a devastating effect on the adoption process.[3] Biological

---

[3] The complications presented by permitting evasion of the limitations period are clearly illustrated here: Over a year and a half after M.N.M. came to live with her adoptive parents, M.J.L. threw their lives into disarray by seeking to intervene in the adoption. They have now been a family unit for over five years. As this case illustrates, when a putative father seeks to undo an adoption after the limitations period has expired, he will most likely meet with resistance and litigation. Practically, such litigation will only be resolved after months and years with harrowing results for the adopted child and the child's adoptive family.

mothers often do not know or even decline, in the exercise of their privacy rights, to disclose the identity or whereabouts of putative fathers in a significant percentage of adoptions. The potentially widespread effect that this decision may have on future, pending and even finalized adoptions counsels intervention by this Court to reverse or clarify the Court of Appeals' decision.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition should be granted.

Respectfully submitted,

E. CALVIN GOLUMBIC*
SHARON M. SCHROER
ARENT, FOX, KINTNER, PLOTKIN
& KAHN
1050 Connecticut Avenue N.W.
Washington, D.C. 20036
(202) 857-6000

Attorneys for Amici Curiae the National Council For Adoption and the Child Welfare League of America

*Counsel of Record

Dated: November 9, 1992

Supreme Court, U.S.
FILED
NOV 18 1992
OFFICE OF THE CLERK

No. 92-600

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

ADOPTIVE PARENTS OF M.N.M.,
Petitioners,

v.

M.J.L.,
Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

PETITIONERS' REPLY BRIEF

LESLIE SCHERR
SCHWEITZER, BENTZEN & SCHERR
1225 Eye Street, N.W.
Suite 900
Washington, D.C. 20005
(202) 371-8900

WILLIAM F. HANRAHAN *
STEVEN M. SAXON
GARY S. TELL
GROOM AND NORDBERG, Chtd.
1701 Pennsylvania Ave., N.W.
Suite 1200
Washington, D.C. 20006
(202) 857-0620
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. THE COURT OF APPEALS HAS ESTABLISHED A CATEGORICAL RULE GRANTING A CLASS OF BIOLOGICAL FATHERS IMMUNITY FROM THE STATUTE OF LIMITATIONS	1
II. THE CASES CONSIDERING THE CONSTITUTIONALITY OF POST-ADOPTION STATUTES OF LIMITATIONS ARE IN CONFLICT	6
CONCLUSION	8

TABLE OF AUTHORITIES

CASES — Page

Block v. North Dakota, 416 U.S. 273 (1983) 6
In re Wildeboer, 406 So.2d 687 (La. App. 2d Cir. 1981) 6
In the Matter of Robert O. v. Russell K., No. 191, 1992 N.Y. Lexis 3478 (N.Y. Oct. 27, 1992) 5, 6
Kidder v. Hess, 11 Fla. Law W. 273, 481 So.2d 984 (Fl. App. 5th Dist. 1986) 6
Lehr v. Robertson, 463 U.S. 248 (1983) 5
Michael H. v. Gerald D., 491 U.S. 110 (1989) 3
Olney v. Gordon, 240 Ark. 807, 402 S.W.2d 651 (Ark. 1966) 6
Summers v. Mylan, 287 Ark, 150, 697 S.W.2d 91 (Ark. 1985) 6
Sumter v. Allton, 278 Ark. 621, S.W.2d 55 (Ark. 1983) 6
Syrovatka v. Erlich, 608 F.2d 307 (8th Cir. 1979), *cert. denied*, 466 U.S. 935 (1980) 6
Wade v. Geren, 743 P.2d 1070 (Okla. 1987) 6
Walter v. August, 186 Cal. App.2d 395 (1960) 6

STATUTES AND RULES

D.C. Code Ann. § 16-310 7

OTHER MATERIALS

National Committee for Adoption, *Adoption Fact Book: United States Data, Issues, Regulations and Resources* (1989) 4
T. Festinger, *Necessary Risk: A Study of Adoptions and Disrupted Adoptive Placements* (1986) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-600

ADOPTIVE PARENTS OF M.N.M.,
Petitioners,

v.

M.J.L.,
Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

PETITIONERS' REPLY BRIEF

I. THE COURT OF APPEALS HAS ESTABLISHED A CATEGORICAL RULE GRANTING A CLASS OF BIOLOGICAL FATHERS IMMUNITY FROM THE STATUTE OF LIMITATIONS.

Respondent contends that the decision of the District of Columbia Court of Appeals creates "no new rights for fathers," and in any event is limited in its application to the "unique facts" of this case. Br. at 4. Respondent is wrong on both counts.

The rule announced by the court of appeals, although couched in words of limitation, is a categorical one. The

statute of limitations may not be applied to a putative biological father who failed to receive notice of a proposed adoption so long as the putative father alleges a consistent course of conduct aimed at securing his status as a parent. Pet. App. 19a. The effect of this rule is to insulate putative biological fathers from the limitations bar in every case in which the opponent of the adoption contends that he has minimally preserved his due process rights by "grasping his opportunity interest" and holding on to it up to the point of filing a formal challenge, no matter how belated.[1]

In essence, the court of appeals has equated the biological father's due process right to notice with a constitutional immunity from the statute of limitations. So long as the father pursues his interest, in whatever haphazard fashion, the legislature may not impose a time limit on bringing the case to court. And according to the respondent and the court of appeals, this immunity from the statute of limitations continues even where the putative father obtains actual knowledge of the adoption decree, announces in open court his intention to challenge it, and then simply fails to act within the statutory period. Pet. App. 7a.[2]

[1] At the time the court of appeals rendered its decision, respondent had not established that he in fact is the father. Pet. App. 2a n. 1. After the petition and the brief in opposition were filed, the trial court received the results of blood tests that indicate a high probability that respondent is the biological father.

[2] The majority opinion was content to dismiss respondent's failure to pursue his claim in these words:

> [Respondent] learned of the adoption in the District in early January, three months before the statute of limitations expired. . . . [W]hile [respondent's] pursuit of his claim in the District of Columbia after January 6 was *perhaps maladroit, we cannot hold that it amounted to forfeiture of his opportunity to challenge the final adoption.*

Pet. App. 18a-19a (emphasis added).

[Continued]

It is evident that nothing in the decision limits the announced rule to the facts of this case. The decision undermines the finality of every adoption decree in which there is a question about the effectiveness of notice to the biological parents, or anyone claiming to be a biological parent. Any unnotified putative biological father who *alleges* that he has not abandoned his opportunity interest will be entitled to an evidentiary hearing on his claim, no matter when it is brought. And contrary to respondent's blithe assertion, the central fact of this case—the refusal or inability of the birth mother to disclose the biological father's identity, thereby blocking prejudgment notice—is far from unique. Indeed, of the 19 appellate decisions cited by petitioners and respondent relating to adoption, 16 involve a failure to give notice of the adoption proceeding to the biological father, or in one case, the biological mother. Moreover, this Court has not been reluctant to address fundamental questions about the sanctity of the family merely because the vast range of human relations produces unconventional fact patterns. *Michael B. v. Gerald D.*, 491 U.S. 110, 113

---

[2] [Continued]

The dissent saw it quite differently.

> . . . . But [respondent] and his St. Louis attorney had actual knowledge of the local adoption proceeding here for several months before the motion to intervene in the adoption proceeding in the local trial court was filed and yet took no legal action to further his interest until it was too late. His experienced counsel would have had no serious difficulty tracing the proceeding. It would be an elementary problem for counsel, perhaps a matter of a few phone calls.
>
> * * * *
>
> I am unable to view this record as portraying a young man floundering alone in a legal maze and not being able to ascertain . . . what to do about it.

Pet. App. 20a, 22a (Gallagher, J., dissenting).

(1989) ("The facts of this case are, we must hope, extraordinary.") (Scalia, J.)[3]

Respondent attempts to divert attention from the policy consideration that has prompted Congress and the legislatures of 31 states to impose a bar on untimely post-judgment challenges to final adoption decrees. According to respondent, this case does not merit review because the court of appeals did not set aside the adoption decree, but merely directed the trial court to consider the putative father's objections to the adoption and evaluate the best interests of the child. Br. at 1, 3-4. Respondent fails to appreciate that the cloud this decision places on the adopted child and her parents—five years after she was given into their care—was precisely what the legislature sought to avoid by imposing an absolute bar to untimely efforts to upset adoption decrees.

Just last month, the Court of Appeals of New York articulated the policy considerations supporting the compelling need for finality in adoptions.

> States have a legitimate concern for prompt and certain adoption procedures and their determination of the rights of unwed fathers need not be blind to the "vital importance" of creating adoption procedures possessed of "promptness and finality," promoting the best interests of the child, and protecting the rights of interested third parties like adoptive parents

---

[3] In 1986, the most recent year for which statistics are available, there were 104,088 domestic adoptions. National Committee for Adoption, *Adoption Fact Book: United States Data, Issues, Regulations and Resources* (1989) at 60. Academic studies of "disruptions" in the adoption process—that is, placement of a child in an adoptive home followed by removal from that home—indicate that about 2% of adoptions are revoked because of "interference" by the biological parents. *Id.* at 197, *citing* T. Festinger, *Necessary Risk: A Study of Adoptions and Disrupted Adoptive Placements* (1986). It thus appears that every year more than 2,000 adoptions are undone at the behest of the biological parents. The studies do not reveal the number of unsuccessful challenges which nevertheless require litigation.

> (*Lehr v. Robertson*, [463 U.S. 248 (1983)] at 263-266, 266 fn 25). Recognizing those competing interests—all of which are jeopardized when an unwed father is allowed to belatedly assert his rights—we stressed . . . that the period in which the biological father must manifest his parental interest is limited in duration: if the father's actions are untimely, the State can deny a right of consent.

In the Matter of Robert O. v. Russell K., No. 191, 1992 N.Y. Lexis 3478 at *11 (N.Y. Oct. 27, 1992). Similarly, the concurrence explained that

> . . . the adoption should be left undisturbed despite petitioner's competing interest in the child not because petitioner is blameworthy, but rather because the strong public policies favoring the finality of adoptions outweigh the interest of a biological father who, through no fault of his own, has been deprived of the opportunity to "manifest and establish his parental responsibility" toward the child . . . .
>
> * * * *
>
> . . . . . While the State must make every effort to protect the rights of biological parents in adoption proceedings . . ., there also must come a point where the matter is deemed irrevocably closed, so that the parties can go forward with their lives, secure in the certainty that their legal and familial status can no longer be disturbed.

Id. at *18-*19, *22 (citations omitted).

The District of Columbia Court of Appeals, although paying lip service to "the powerful demand for finality in adoption proceedings," Pet. App. 8a, nevertheless held the statute of limitations unconstitutional as applied. Pet. App. 19a. It did so without examining the importance of the competing interest of the state, the child, and the adoptive parents in being free from the burden of unexpected and protracted litigation that, in this case, has continued for four years following the entry of a final decree. Moreover, the court—and now the respondent—

fail to explain how this result can be squared with the unbroken line of this Court's decisions holding that the legislature may constitutionally bar stale claims. *E.g.*, *Block v. North Dakota*, 416 U.S. 273, 292 (1983).

II. THE CASES CONSIDERING THE CONSTITUTIONALITY OF POST-ADOPTION STATUTES OF LIMITATIONS ARE IN CONFLICT.

Respondent contends that there is no conflict between the court of appeals' decision and *Walter v. August*, 186 Cal. App. 2d 395 (1960) and *Syrovatka v. Erlich*, 608 F.2d 307 (8th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980). Remarkably, respondent asserts that these decisions are in harmony because in *Walter* and *Syrovatka*—where the courts refused to invalidate the statute of limitations on due process grounds—the objecting parent obtained actual knowledge of the adoption proceeding, but failed to act within the limitations period. Br. at 7-8. That, of course, is precisely the fact here. "[Respondent] learned of the adoption in the District in early January, three months before the statute of limitations expired." Pet App. 18a. Respondent's effort to reconcile the evident conflict makes no sense.[4]

Since the petition was filed, the conflict has widened. On October 27, 1992, the Court of Appeals of New York decided *In the Matter of Robert O. v. Russell K.*, *supra*.

---

[4] The other cases cited by respondent do nothing to resolve the conflict. Br. at 8. Each of these cases involved a biological father's challenge to an adoption brought within the time allowed by the state's statute of limitations. The cases merely demonstrate that the supposedly "unique facts" here—the birth mother's concealment of the adoption from the biological father—arise with distressing frequency. *Wade v. Geren*, 743 P.2d 1070, 1073 (Okla. 1987); *Kidder v. Hess*, 11 Fla. Law W. 273, 481 So.2d 984 (Fl. App. 5th Dist. 1986); *Summers v. Mylan*, 287 Ark. 150, 152, 697 S.W.2d 91, 92 (Ark. 1985); *Sumter v. Allton*, 278 Ark. 621, 624, 648 S.W.2d 55, 56 (Ark. 1983); *In re Wildeboer*, 406 So.2d 687, 689-90 (La. App. 2d Cir. 1981); *Olney v. Gordon*, 240 Ark. 807, 811, 402 S.W.2d 651, 653 (Ark. 1966).

This case presents the conflict of competing interests among innocent parties in its purest form. The biological parents became engaged, began living together, became embroiled in domestic conflict, and then separated and ceased communication. Unbeknownst to the father, the mother had become pregnant during their relationship. She gave birth and immediately placed the child for adoption, all without informing the father. The couple subsequently reconciled and married. Only after the marriage did the mother inform her husband of the birth and the adoption. The father then promptly sought to set aside the adoption decree, which had become final 10 months earlier. *Id.* at *2-*3.

The New York Court of Appeals rejected the father's efforts to upset the adoption, recognizing that the ". . . 'vital importance' of creating adoption procedures possessed of 'promptness and finality' . . ." far outweighed the father's interest purportedly protected under the Due Process clause. *Id.* at *11. The court reasoned that the focus of analysis must be the child, and that the claims of right asserted by biological parents must be measured against the potentially devastating impact that legal uncertainly is sure to have upon an adoptive child. With this focus in mind, the court had no difficulty ruling that the father could not be permitted to attack the familial relationship that had been established. *Id.* at *12.

The New York court concluded that the final adoption decree was not subject to attack in the absence of any statute of limitations that prescribes a period within which an adoption decree may be challenged. Here, in contrast, Congress made a legislative judgment that balanced the competing interests of the child, the adoptive parents, and the biological parents, and embodied that judgment in D.C. Code Ann. § 16-310. By so doing, Congress determined that one year following entry of the decree is the maximum period for which an adopted child should be exposed to the threat of an attack on the

adoption. What the respondent characterizes as an "absolutist" position, Br. at 9, is exactly the judgment that Congress made, but which the court of appeals, and some other courts, have decided to ignore. This Court should act to correct this situation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LESLIE SCHERR
SCHWEITZER, BENTZEN
& SCHERR
1225 Eye Street, N.W.
Suite 900
Washington, D.C. 20005
(202) 371-8900

WILLIAM F. HANRAHAN *
STEVEN M. SAXON
GARY S. TELL
GROOM AND NORDBERG, Chtd.
1701 Pennsylvania Ave., N.W.
Suite 1200
Washington, D.C. 20006
(202) 857-0620
* Counsel of Record

Dated: November 18, 1992